United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT-PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

376

No. 17,379

ROBERT A. JONES and LLOYD BURLINGHAM, d/b as
McHENRY COUNTY BROADCASTING CO.,
Woodstock, Illinois,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

No. 17,481

ROBERT A. JONES and LLOYD BURLINGHAM, d/b as
McHENRY COUNTY BROADCASTING CO.,
Woodstock, Illinois,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and
UNITED STATES OF AMERICA,

Respondents

Appeal from and Petition for Judicial Review of
Orders and Actions of the Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED[1]

1. Does the Federal Communications Commission's "freeze" rule set forth in a "Note" following 47 C.F.R. 1.354 constitute a substantive rather than a procedural rule change, and if so, was the Commission required to give notice and/or follow the public rule making procedure prescribed by Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003?

2. Did the Commission act arbitrarily and capriciously, and did it deprive appellant[2] of due process of law, when, without a hearing as provided in Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, it returned appellant's application?

3. Does the Commission's "freeze" rule violate the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), that broadcasting is to be left in the area of free competition?

4. Did the Commission's failure to give any advance notice of the "freeze" constitute arbitrary and capricious action which deprived appellant of due process of law?

5. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

6. Was there a reasonable relationship between the Commission's imposition of the "freeze" and its resultant return of appellant's application on the one hand, and the rule-making announced in the Commission's Report and Order of May 10, 1962, on the other hand?

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[1] See prehearing stipulation of February 5, 1963.

[2] "Appellant," as used herein and elsewhere in this brief, refers to Robert A. Jones, et al., in his character of petitioner as well as of appellant.

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BRIEF FOR PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

The Petition for Review and the Notice of Appeal in these consolidated cases are directed against the Memorandum Opinion and Order of

the Federal Communications Commission (R. 24-43), appellee-respondent herein (Commissioner Hyde dissenting and Commissioner Henry not participating), ordering the rejection of the application of Robert A. Jones and Lloyd Burlingham, d/b/a McHenry County Broadcasting Company, for a construction permit for a new standard broadcast station at Woodstock, Illinois.

Jurisdiction to hear the appeal is conferred upon this Court by Section 402(b) and (c) of the Communications Act of 1934, as amended [66 Stat. 718, 47 U.S.C. 402(b) and (c)]. Jurisdiction to hear the Petition for Review is conferred by the Judicial Review Act of 1950 [Act of December 29, 1950, c. 1189, 64 Stat. 1129, 5 U.S.C. 1032-1034, 1039], as amended; Section 402(a) of the Communications Act of 1934, as amended; (48 Stat. 1093, 47 U.S.C. 402(a)]; and Section 10(a) of the Administrative Procedure Act [60 Stat. 243, 5 U.S.C. 1009(a)]. Venue in this Court is provided by Section 3 of the Judicial Review Act [64 Stat. 1130; 5 U.S.C. 1033].

STATEMENT OF THE CASE

Pursuant to the Communications Act of 1934, as amended, the appellee Commission is empowered to issue construction permits and licenses for new standard and FM radio broadcast stations, and for television broadcast stations. The Rules of the appellee Commission establish substantive criteria which are used in determining whether or not an application for a new standard radio station may be granted (Cf., Part III of the Commission's Rules, 47 C.F.R. 3.1, et seq.), and they establish procedures which are to be followed in making application for such a station (Cf., part I of the Commission's Rules, 47 C.F.R. 1.10, et seq.)

On or about November 25, 1961, Mr. Robert Jones corresponded

[1] Technically, the Commission is an appellee-respondent in this proceeding and McHenry County is an appellant-petitioner. However, to avoid cumbersome language, the Commission will hereinafter be referred to simply as an "appellee," and McHenry as "appellant."

with Mr. Lloyd Burlingham, suggesting that a partnership be formed to apply to the FCC for a construction permit for a new standard broadcast station at Woodstock, Illinois. Woodstock is a community of 8,897 persons, and is the County Seat of McHenry County, Illinois. Woodstock has no local radio station.

Relying upon the Rules and Regulations of the Commission then in effect, Messrs. Jones and Burlingham proceeded with plans for an application. On December 15, 1961, a final partnership understanding was reached; and a definite decision was made to go forward. By the first week in February, 1962, a suitable tract of land was located for the station's tower and transmitter building, and on March 24, 1962, the partners signed a firm lease on the land. By that time, work on the application had progressed to such an extent that the application could easily have been completed and filed within 30 days time, and probably within 10 days time, had any reason appeared for the filing of the application within such a time period. However, there did not appear to be any urgency, and the partners felt that it was desirable to delay the filing of the application until after they had received the approval of the McHenry County Zoning Board for the erection of towers on their proposed transmitter site. A zoning hearing was, in fact, held on March 27, 1962, and on April 29, 1962, the partnership was notified that approval had been granted.

Upon receipt of the notice that the zoning board had acted favorably, the partnership proceeded with dispatch to undertake the final steps needed to complete its application. On May 9, 1962, photographs were taken of the transmitter site (as required by FCC Rules). These constituted the last bit of information needed for the application. It was the intention of the partnership to have these photographs developed and printed by May 11 or 12, and to mail the application to its attorneys on May 12, with the understanding that it would be filed on May 14 or 15.

On May 10, 1962, however, the Federal Communications Commis-

sion, abruptly and without advance notice, issued a Report and Order (R. 1-5) announcing that from that date forward — with trifling exceptions — it would accept no more applications for new standard broadcast stations. By its terms, the Order (known herein as the "freeze" order) purported to bar the acceptance of all such applications as the McHenry County application. However, because the applicant believed that the Commission had no legal right to apply a "freeze" to Petitioner's application, and because the Appellant believed that, in any event, it had compelling and convincing reasons for a waiver of the "freeze," Appellant proceeded to file its application anyway, on May 16, 1962. Thereafter, on June 25, 1962, Appellant filed a Petition for Acceptance of its Application (R. 9-23).

On October 10, 1962, the Commission issued a Memorandum Opinion and Order (R. 24-43) denying McHenry's Petition and directing that the application be physically returned. In said Memorandum Opinion and Order, the Commission stated that it had given no consideration to the Petition, because it was not filed within 30 days after the publication of the freeze order in the Federal Register.

Appellant hereby seeks review of the aforesaid Memorandum Opinion and Order. Appellant further requests that the Federal Communications Commission be required to accept and process Appellant's application.

STATUTES AND RULES

The applicable sections of the Communications Act, the Administrative Procedure Act, the Federal Register Act and the Commission's Rules, are set forth in the Appendix to this Brief.

STATEMENT OF POINTS

1. The Commission's "Freeze" Order of May 10, 1962, was unlawful and invalid, since — without a hearing and with no advance notice — it purported to arbitrarily and capriciously cut off appellant's right to file an application for a new standard broadcast station at Woodstock, Illinois, even though said application was in full conformity with, and had been prepared in reliance upon, the Commission's Rules.

2. The Commission's "freeze" Order of May 10, 1962 (R. 1-5), was unlawful and invalid, since it constituted an attempt to accomplish a substantive rule change without first initiating and carrying out rule-making proceedings, as required by law (specifically Section 4 of the Administrative Procedure Act (60 Stat. 238, 5 U.S.C. § 1003) and Section 1.211 of the Commission's Own Rules (47 C.F.R. 1.211)).

3. The Commission's actions arbitrarily and capriciously denied Appellant's application without the hearing to which Appellant is entitled by reason of the provisions of Section 309 of the Communications Act.

4. The Commission's freeze on the acceptance and processing of applications filed after May 10, 1962, is invalid, because it affords protection from competition to existing stations and to applications filed on or before May 10, 1962, in violation of the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) that broadcasting should be left in the area of free competition.

SUMMARY OF ARGUMENT

The freeze is basically arbitrary and capricious and contrary to law for a number of separate, distinct and independent reasons -- any one of which requires a finding for appellant in this proceeding. Because the freeze was adopted without any advance notice, it violates the most basic and elementary requirement of procedural due process. Because the freeze affords protection from competition to existing stations and to applications filed on or prior to May 10, 1962, it is contrary to

the doctrine clearly enunciated by the Supreme Court in the Sanders Radio case (supra, p. 5) that the Communications Act requires broadcasting to be left in the area of free competition — and not afforded the protection from competition which is given to common carriers. Further, although the FCC has sought to defend its treatment of the freeze on the grounds that it was a procedural action, and not a substantive action requiring rule making, the fact that no notice or opportunity was given to the public to comply with the newly enacted freeze requirements, and the far reaching impact of the requirements themselves belie the contention that the freeze is merely a procedural device. On the contrary, it is a substantive action, which could not be lawfully adopted without rule making proceedings and could not be made effective without reasonable notice. Finally, the Commission's actions returning Appellant's application and the applications of the other appellants in this consolidated proceeding were unlawful, because they contravened the requirement of Section 309(e) of the Communications Act that no application shall be denied without a hearing.

ARGUMENT

I

The Freeze Must Fail for Lack of Notice

Action with respect to an application for a construction permit is judicial in character. Sec. 2(d)(e) Administrative Procedure Act (60 Stat. 237, 5 U.S.C. § 1001(d)(e)). And when an administrative body acts judicially, timely and adequate notice are indispensable to due process. (Magnolia Petroleum Company v. Carter Oil Company (10 Cir. 1955), 218 F.2d 1, 6, cert. den. 349 U.S. 916 (1955); Parker v. Lester (9 Cir. 1955), 227 F.2d 708, 716; Detrio v. United States, (5 Cir., 1959), 264 F.2d 658, 662; Unity School of Christianity v. Federal Radio Commission (D.C. Cir., 1933), 62 U.S. App. D.C. 52, 64 F.2d 550).

This Court need go no further to decide this case. Notice is an indispensable ingredient of procedural due process and here, the Com-

mission purports to impose a freeze on the acceptance and processing of virtually all types of applications for an entire class of broadcast station, without any advance notice whatsoever. Appellant, and others similarly situated, had expended large sums of money, and much time and effort in the preparation of applications, in reliance upon the Commission's existing rules, which expressly allowed such applications to be filed, accepted, processed and granted. It was arbitrary and capricious for the Commission to attempt to change those rules — and thereby deprive the Appellant and others of all of the work, time, and expense invested in their proposals, without giving some reasonable advance warning.

In Ridge Radio Corporation v. Federal Communications Commission, 110 U.S. App. D.C. 277, 292 F.2d 770 (D.C. Cir. 1961), this Court emphasized that adequate notice is a prerequisite to the validity of procedures limiting the right to file standard broadcast applications. In commenting upon the "cut-off" procedure (described in Appellant's Statement of the Case), this Court has said,

> ". . . when a particular cut-off date is fixed by public notice, a potential applicant is entitled to rely on the terms of the notice." Ridge Radio Corporation v. Federal Communications Commission, supra, at p. 773.

Under the Commission's Rules, in effect on the day when the freeze order was adopted, there was no limit on the time in which to file applications, except that if such applications involved a conflict with some other application, they had to be on file by the cut-off date of that other application, published in the Federal Register.[2] Appellant's application, however, was not in conflict with any other application. Hence, no limiting "cut off" date had been established, and Appellant was, therefore, on constructive notice that it might file its application at any time it wished.

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[2] Cf. Sections 1.354 and 1.361 of the Rules, re-printed in the Appendix to this brief.

Having established regularized procedures for the publication of "cut-off dates" and deadlines, the Commission was bound to follow those procedures. Service v. Dulles, 354 U.S. 363, 372 (1957); United States v. Shaughnessey, 347 U.S. 260, 266-267 (1954). Just as a state legislature cannot shorten the statute of limitations on negligence, contract or the like without giving reasonable advance warning to those who are relying on the old statute,[3] so the Commission could not, consistent with the requirements of due process, change its established procedures and place a limit on the time in which to file Appellant's application without first giving some reasonable notice.

II

The Freeze is Generally Arbitrary and Capricious

The Commission, however, did not give reasonable notice. Nor did it act reasonably. Although the freeze order refers to a partial halt in the acceptance and processing of AM applications, the interim criteria adopted by the Commission are so stringent as to bar virtually all applications for new AM stations -- a fact evidenced by the Commission's own statistics which show that during the 10 months since the freeze was imposed, a total of only 4 such applications have been filed and accepted, in accordance with the "interim criteria." The interim criteria themselves are arbitrary and whimsical. Take, for example, the requirement that an applicant for a new station must serve 25% "white" area. In a remote section of Maine, where the total population served by a station may be only 10,000 people or less, 25% of the total may be 2,500 people. Consequently, an applicant serving 2,500 people in a white area in Maine can get his proposal accepted for filing. In New York state, on the other hand, where the population is denser, a radio station may serve, say, 100,000 people. In that situation, if an applicant comes to the Commission and proposes to serve 20,000 people in a white area, his application will be rejected, because 20,000 persons does not comprise 25% of the population to be served. Yet by what

[3] McCloskey & Co. v. Eckart (5th Cir. 1947), 164 F 2d 257; U.S. v. Morena, 245 U.S. 392 (1918); 34 Am. Jur., Limitation of Actions, § 28.

right can the Commission contend that the needs of 20,000 people in New York for a first radio service must be ignored, while the needs of 2,500 people in Maine are held to be so important as to require acceptance of an application to serve those people?

III

The Freeze is Contrary to the Sanders Doctrine That Broadcasting Must Be Left Open To Free Competition

No less an authority than the United States Supreme Court has held that in enacting the Communications Act, Congress intended to leave broadcasting open to free competition, and not to provide for the broadcasting industry the type of economic protectionism associated with common carrier regulation. In the landmark case of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), the Supreme Court said as follows:

> "Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads [citations omitted] in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures. . . . [supra, at p. 474]."

By affording protection from competition to existing stations and to applicants whose applications were filed on or before May 10, 1962, the freeze runs directly counter to the Supreme Court's construction of the intent of Congress.

True, the Commission's freeze order does not speak of economic considerations. It is a fact, however, that at least one Commissioner, E. William Henry, recently publicly stated that the freeze is justified because of the allegedly depressed economic condition of the AM broadcasting industry.[4] Moreover, the May 14, 1962 issue of Broadcasting

[4] Mr. Henry made his statement in a speech to the Federal Communications Bar Association, delivered on December 13, 1962.

Magazine reported that on April 25, 1962 – approximately two weeks prior to the imposition of the freeze, a three-man delegation from the National Association of Broadcasters (an organization of existing radio stations headed by Leroy Collins, former Governor of Florida) met privately with the FCC Chairman Newton Minow, to discuss alleged "overpopulation" or excessive number of radio stations in the United States. Thus, the milieu from which the freeze sprang cannot be divorced entirely from economics.

But regardless of the sources of the Commission's actions, they are in any event violative of the Sanders doctrine because – irrespective of intent – they close the broadcasting industry to new competition, and deny to new applicants such as Appellant the right to enter the broadcasting field and compete on equal terms, either with existing stations or with those preferred applicants whose proposals – by purely fortuitous circumstance – happened to be filed on or before May 10, 1962.

IV

The Freeze is Invalid Because the Commission Failed to Comply With the Rule-Making Procedures Required By Law and by the Commission's Own Rules

Additionally, the freeze must be struck down because the Commission failed to hold the rule making proceedings which, under Section 4 of the Administrative Procedure Act and Section 1.211(a) of the Commission's own Rules, are essential pre-requisites to the enactment of new substantive rules. The Commission's contention that the freeze is a "procedural" and not a "substantive" action, is lacking in merit. The term "procedure" refers to a method or manner of doing something.[5] Thus, a procedural change is a change in the manner or method whereby something must be done. For example, if the Commission should adopt a rule requiring all future applications to be filed on green paper, it

[5] Webster's New Collegiate Dictionary, 1961 Edition, page 672, defines "procedure" as "a manner or method of proceeding in a process or course of action."

would be a procedural rule, because it would change the method or manner in which applications are to be filed, in the future.

We do not understand, however, how a rule prohibiting the filing of any more applications can be considered "procedural." It does not change the method or manner in which applications are to be filed. Rather, it simply tells applicants that they may not file at all (unless they meet certain virtually impossible conditions — conditions which are themselves clearly substantive and not procedural in nature).

Section 4(a) of the Administrative Procedure Act provides, in substance, that no substantive rule may be enacted without rule making proceedings, unless the "agency, for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."[6] No good cause existed, however, for any exceptions to the requirement of rule making in this case. The Commission's apprehension, expressed in its October 10 Memorandum Opinion and Order (R. 24-43) that reasonable notice and compliance with the APA might have led to a "flood of several hundred hastily prepared applications" is no justification for the Commission's actions in this case. If the Commission received applications which were incomplete or otherwise not in compliance with its requirements for acceptance for filing, it was under no obligation to accept such applications, and had a perfect right to return them to the applicants. Clearly, the Commission's apprehension was directed merely to the possibility that its work load might be increased by the necessity of considering a number of additional applications. But to dispense with required rule making proceedings for reasons of workload is to subordinate the merits of individual cases to the dictates of mere administrative expediency — something which obviously cannot be condoned.

To sum up, Appellant agrees with Commissioner Hyde, who specifically dissented from the freeze order because, as he observed in

[6] Similar provisions are found in Section 1.211 of the Commission's own Rules.

his dissenting statement, the freeze was "essentially a substantive policy decision and ought to be the subject of a public notice before decision." If the Commission had complied with Section 4 of the Administrative Procedure Act and Section 1.219(a) of its own Rules, Appellant would have had an opportunity to participate in the rule making proceeding and even if the proceeding had terminated in a decision to impose a freeze, Appellant would still have had plenty of time in which to file its application, since the freeze could not have become effective until at least 30 days after the termination of the proceeding.[7]

V

The Return of Appellant's Application Was Contrary To Section 309(e) of the Communications Act, Which Provides that No Application may be Denied Without Hearing.

Finally, the Commission's action, returning Appellant's timely filed application without hearing, was directly contrary to the clear requirements of Section 309 of the Communications Act. Section 309(a) specifically provides that,

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application, and upon consideration of such other matters as the Commission may officially notice, shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

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[7] Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003(c) provides, in pertinent part:

> "The required publication or service of any substantive rule (other than one granting or recognizing exemptions or relieving restriction or interpretative rules and statement of policy) shall be made not less than thirty days prior to the effective date thereof . . . ."

Section 1.219(a) of the Commission's Rules provides, moreover, that

> "Any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register except as otherwise specified in paragraphs (b) and (c) of this section."

But what about applications as to which the Commission cannot make the findings pre-requisite to a grant? With respect to these latter applications, Section 309(e) provides as follows:

> "If, in the case of any application to which subsection (a) of this Section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally."

Thus, when confronted with a proper application, the Commission has two choices: either grant it or designate it for hearing. In this case, the Commission did neither. Instead, it returned Appellant's application without a hearing and, accordingly, its actions must be reversed.

VI

The Commission Erred in Refusing to Consider Appellant's Petition for Acceptance of Its Application

Finally, the Commission erred in refusing to consider Appellant's Petition for acceptance of its application. From the Commission's Memorandum Opinion and Order of October 10, 1962 (R. 24-43), it is clear that the refusal to consider the Petition was based solely on the fact that the Petition was filed on June 22, 1962, whereas the Commission, for some arbitrary and unjustifiable reason, elected to consider no Petitions filed after June 15, 1962 (R. 24).

Reference is made in the Commission's Memorandum Opinion and Order to the term "reconsideration." The Commission's Rules require petitions for reconsideration to be filed within 30 days after the taking of the action as to which reconsideration is sought. Appellant's Petition, however, did not ask the Commission to reconsider its "freeze" order.

And Appellant could scarcely have asked the Commission to reconsider its decision to apply the freeze to Appellant's application, because, as of June 22, 1962, the Commission had not yet reached a decision whether or not to apply the freeze to Appellant's application.[8]

What Appellant did do was to argue that (1) the freeze could not lawfully be applied to its application and (2) in any event, the freeze should be waived to allow its application to be filed. The Commission should have considered Appellant's arguments, and its refusal to do so constitutes reversible error.

If the Commission had been willing to listen, appellant could have shown that its application proposes a first local standard broadcast radio service to Woodstock, Illinois, a community of 8,897 persons, which is the County Seat of McHenry County, Illinois, and that the public need for a local radio station in Woodstock amply justifies waiver of the freeze. The Commission's Rules specifically provide for waivers in appropriate cases.[9] And the United States Supreme Court has held that general rules cannot bar the right to a hearing on meritorious applications where the applications "set out adequate reasons why the rules should be waived or amended." United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). Hence, even if it had decided that the freeze was otherwise applicable to Appellant, the Commission

[8] It will be recalled that, immediately after the freeze order was issued, one of the affected applicants, Fleet Enterprizes, filed a Petition for Mandamus, asking this Court to require the acceptance of its application. In its Reply to the Petition for Mandamus, the Commission argued (successfully) that Petitioner had no standing to request Mandamus because, its application not having been returned, it had suffered no aggrievement. It is difficult, therefore, to understand how an applicant whose application had not yet been returned could have suffered an aggrievement such as would enable the applicant to maintain a petition for reconsideration.

[9] Section 1.15 of the Rules provides "any provision of the Rules may be waived . . . on petition if good cause therefor is shown."

should not have returned Appellant's application without a full and sufficient hearing on Appellant's request for waiver.

CONCLUSION

For the foregoing reasons, the freeze order and the Commission's Memorandum Opinion and Order of October 10, 1962 should be set aside; and these proceedings should be remanded to the Commission with instructions to accept Appellant's application for filing and processing, effective as of May 16, 1962.

Respectfully submitted,

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APPENDIX

Administrative Procedure Act, Section 2

Order and Adjudication

(d) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

License and Licensing

(e) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Administrative Procedure Act, Section 4

Rule Making

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts — .

Notice; publication and contents

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Procedures

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any

manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of section 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

Time of publication or service of rules

(c) The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

Petitions

(d) Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. June 11, 1946, c. 324, § 4, 60 Stat. 238.

Rules of the Federal Communications Commission

§ 1.211 Notice of proposed rule making. — (a) When pursuant to petition therefor, or upon its own motion, the Commission proposes to issue, amend or repeal a substantive rule, a notice of proposed rule making will be published in the Federal Register unless all persons subject thereto are named and either are personally served or otherwise have actual notice thereof in accordance with law. Except when notice is required by statute or when the Commission considers it desirable, a notice will not ordinarily be issued of the adoption, amendment or repeal of interpretative rules, general statements of policy, organization rules, procedures or practice; matters relating to military, naval or foreign affairs functions of the United States, Commission management or personnel, public property, loans, grants, benefits or contracts; or in any situation in which the Commission for good cause finds (and incorporates such finding in the rule issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.

§ 1.219 Effective date of rules. — (a) Any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register except as otherwise specified in paragraphs (b) and (c) of this section.

(b) For good cause found and published with the rule, any rule issued by the Commission may be made effective within less than 30 days from the time it is published in the Federal Register. Rules involving any military, naval or foreign affairs function of the United States; matters relating to agency management or personnel, public property, loans, grants, benefits or contracts; rules granting or recognizing exemption or relieving restriction; or organization rules, procedure or practice, or interpretative rules and statements of policy may be made effective without regard to the 30-day requirement.

(c) * * * [Relates to Common Carriers only]

§ 1.354 Processing of standard broadcast applications. — (a) Applications for standard broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations (except applications for new Class II-A stations) or for major changes in the facilities of authorized stations, i.e., any change in frequency, power, hours of operation, or station location: Provided, however, that the Commission may, within 15 days after the tender for filing of any application for other modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of § 1.359.

(2) The second group consists of applications for licensees and all other changes in the facilities of authorized stations.

(3) The third group consists of applications for new Class II-A stations.

(b) If an application is amended so as to effect a major change as defined in paragraph (a)(1) of this section or so as to result in a transfer of control or assignment which, in the case of an authorized station, would require the filing of an application therefor on FCC Form 314 or 315 (see § 1.329), § 1.359 will apply to such amended application.

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first.

Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

(d) Applications for new Class II-A stations are placed at the head of the processing line and processed as quickly as possible. Action on such applications may be at any time: (1) more than 30 days after public notice is given of acceptance of the application for filing, or (2) after January 30, 1962, whichever is later.

(e) The processing and consideration of applications for new stations or major changes on those frequencies specified in § 1.351 are subject to certain restrictions, as set forth therein.

(f) Applications other than those for new stations or for major changes in the facilities of authorized stations are not placed on the processing line but are processed as nearly as possible in the order in which they are filed.

(g) Applications for modification of license to change hours of operation of a Class IV station, to decrease hours of operation of any other class of station, or to change station location involving no change in transmitter site will be considered without reference to the processing line.

(h) If, upon examination, the Commission finds that the public interest, convenience and necessity will be served by the granting of an application, the same will be granted. If, on the other hand, the Commission is unable to make such a finding and it appears that a hearing may be required, the procedure set forth in § 1.362 will be followed.

(i) When an application which has been designated for hearing has been removed from the hearing docket, the application will be returned to its proper position (as determined by the file number) in the processing line. Whether or not a new file number will be assigned will be determined pursuant to paragraph (j) of this section after the application has been removed from the hearing docket.

(j)(1) A new file number will be assigned to an application for a new station, or for major changes in the facilities of authorized stations, when it is amended to change frequency, to increase power, to increase hours of operation, or to change station location. Any other amendment modifying the engineering proposal, except an amendment respecting the type of equipment specified, will also result in the assignment of a new file number unless such amendment is accompanied by a complete engineering study showing that the amendment would not involve new or increased interference problems with existing stations or other applications pending at the time the amendment is filed. If, after submission and acceptance of such an engineering amendment, subsequent examination indicates new or increased interference problems with either existing stations or other applications pending at the time the amendment was received in the Commission, the application will then be assigned a new file number and placed in the processing line according to the numerical sequence of the new file number.

(2) A new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50 per cent or more ownership interest in the amended application.

(3) An application for changes in the facility of an existing station will continue to carry the same file number although an assignment of license or transfer of control of said licensee (permittee) — applicant has been consented to by the Commission, provided the application for changes in facility (FCC Form 301) is amended jointly by the assignor and assignee or transferor and transferee, upon consummation of the assignment or transfer, to reflect the ownership changes and to include the financial and programming proposals of the new licensee (permittee) — applicant.

(k) When an application is reached for processing, and it is necessary to address a letter to the applicant asking further information, the application will not be processed until the information requested is received, and the application will be placed in the pending file to await the applicant's response.

(l) When an application is placed in the pending file, the applicant will be notified of the reason for such action.

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in § 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

Action on Applications

§1.361 Grants without hearing of authorizations other than licenses pursuant to construction permit; procedure for filing informal objections. — **(a)** Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to the grant. Such objections shall be signed by the objector. The limitation on pleadings and time for filing pleadings provided for in §1.13 shall not be applicable to any objections duly filed under this section.

(b) If the Commission finds, in the case of any application for an instrument of authorization other than a license pursuant to a construction permit, on the basis of the application, the pleadings filed, or other matters which it may officially notice, that the application meets the following requirements and presents no substantial and material question of fact, it will make the grant if:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (c) of this section;

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of provisions of law or this chapter or established policies of the Commission; and

(4) A grant of the application would otherwise serve the public interest, convenience, and necessity.

(c) In making its determinations pursuant to the provisions of paragraph (b) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

NOTE: Paragraph (c)(2) of this section applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also §§1.106(b)(1) and 1.354(c) and (h).

(d) If a petition to deny the application has been filed in accordance with §1.359 and the Commission makes the grant in accordance with paragraph (b) of this section, the Commission will deny the petition and issue a concise statement setting forth the reasons for denial and disposing of all substantial issues raised by the petition.

BRIEF FOR APPELLEE-RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17,379 and 17,481

ROBERT A. JONES & LLOYD BURLINGHAM, d/b/a McHENRY COUNTY BROADCASTING Co.,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

Nos. 17,421 and 17,483

FREDERICK ECKARDT, d/b/a MANSFIELD BROADCASTING COMPANY,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

Nos. 17,415 and 17,479

DUPAGE COUNTY BROADCASTING, INC., ELMHURST, ILLINOIS,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

Nos. 17,424 and 17,478

GOOD MUSIC BROADCASTING COMPANY,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

ON APPEALS FROM AND PETITIONS FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

The questions presented in this consolidated proceeding were agreed upon in a pre-hearing stipulation which was approved by Order of this Court of February 13, 1963. These questions are as follows:

1. Does the Federal Communications Commission's "freeze" rule set forth in a "Note" following 47 CFR 1.354 constitute a substantive rather than a procedural rule change, and if so, was the Commission required to give notice and/or follow the public rule making procedure prescribed by Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003?

2. Did the Commission act arbitrarily and capriciously, and did it deprive each appellant[1/] of due process of law, when, without a hearing as provided in Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, it returned each appellant's applications?

3. Does the Commission's "freeze" rule violate the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, that broadcasting is to be left in the area of free competition?

4. Did the Commission's failure to give any advance notice of the "freeze" constitute arbitrary and capricious action which deprived each appellant of due process of law?

1/ The word "appellant" as used herein refers both to appellants and to petitioners; the word "appellee" refers both to appellees and to respondents.

5. Was the Commission's refusal to consider each appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

6. Was there a reasonable relationship between the Commission's imposition of the "freeze" and its resultant return of appellant's applications on the one hand, and the rule making announced in the Commission's Report and Order of May 10, 1962, on the other hand?

7. With respect to Case Nos. 17,421 and 17,483 was the Commission arbitrary and capricious in refusing to accept appellant's application and in denying appellant's request for waiver in light of appellant's assertions that this application complied with all of the Commission's substantive rules, that it provided for an improved utilization of the frequencies involved, and that it would not preclude achievement of the Commission's objectives in the rule making proceedings announced in the Report and Order of May 10, 1962?

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FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent

ON APPEALS FROM AND PETITIONS FOR REVIEW OF
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

These consolidated cases involve appeals under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), and petitions for review of the same orders filed under Section 402(a) of the Act, 47 U.S.C. 402(a). The appellants[1/] are:

1) Robert A. Jones and Lloyd Burlingham, d/b as McHenry County Broadcasting Co., Woodstock, Illinois, Case Nos. 17,379 and 17,481.

2) DuPage County Broadcasting, Inc., Elmhurst, Illinois, Case Nos. 17,415, and 17,479.

3) Frederick Eckardt, d/b as Mansfield Broadcasting Company, Mansfield, Ohio, Case Nos. 17,421, and 17,483.

4) Good Music Broadcasting Company, Case Nos. 17,424, and 17,478.

The appellants appeal from and seek review of:

(1) the Commission's Report and Order of May 10, 1962 (Jones, R. 1-5),[2/] establishing a general "freeze" (hereinafter referred

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1/ The designation "appellant" will be used in this brief to refer to appellants and petitioners in the Court of Appeals. The designation "appellee" will refer to the United States and the Commission. The designation "petitioner" will refer to participants in the proceedings conducted by the Commission.

2/ The individual records in these cases were not consolidated into one volume. Record references therefore will be identified by the name of the appropriate appellant, followed by the record page number, as "Jones, R. 1", or "DuPage, R. 1". Where a Commission order is contained in more than one record, it will be referred to only in the record of the lead case.

to as the "freeze" order, subject to certain exceptions, on Commission acceptance of applications for new standard broadcast stations or for major changes in existing stations; (2) the Commission's Memorandum Opinion and Order of October 10, 1962, released October 15, 1962 (Jones, R. 24-43), denying the appellants' petitions for reconsideration or waiver; and (3) the Commission's letter orders addressed individually to each appellant (Jones, R. 44), (DuPage, R. 31), (Eckardt, R. 46), (Good Music, R. 38), returning each appellant's application for a construction permit for new standard broadcast facilities or for major changes in power or frequency of existing stations as being inconsistent with the Commission's "freeze" order.

Case Nos. 17,379, 17,415, 17,421, and 17,424 invoke the jurisdiction of this Court under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b). The petitioners in Case Nos. 17,478, 17,479, 17,481, and 17,483 assert jurisdiction under Section 402(a) of the Communications Act, 47 U.S.C. 402(a), and under the Judicial Review Act of 1950, 5 U.S.C. 1032, et seq.

It is the Commission's view that Case Nos. 17,379, 17,415, 17,421, and 17,424 are properly within the jurisdiction of this Court under the decisions in Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240, and Ridge Radio Corp. v. Federal Communications Commission, 110 U.S. App. D.C. 277, 292 F.2d 770. The Commission concurs with and joins in the separate statement filed on behalf of the United States of America

by the Department of Justice that Case Nos. 17,478, 17,479, 17,481, and 17,483 are not properly within the jurisdiction of this Court and should be dismissed.

COUNTERSTATEMENT OF THE CASE

Appellants in these consolidated cases have written separate statements generally emphasizing different aspects of the Commission's actions here under review. It is believed that a single counterstatement of the entire proceedings will be of assistance to the Court.

The pertinent facts are as follows:

A. The Commission's Report and Order of May 10, 1962.

On May 10, 1962, the Commission released a Report and Order, effective that same day (Jones, R. 1-5), in which it amended Section 1.354 of the Commission's Rules (47 CFR 1.354) to establish a temporary, partial "freeze" on the acceptance of applications for new and changed standard (AM) radio facilities. The Commission stated that it found it necessary to impose an immediate "freeze" because the tremendous growth in the number of standard broadcast stations from 955 in 1945 to 3,871 in 1962 had created certain problems which called for an immediate re-examination of the standards employed by the Commission in assigning new or changed standard broadcast facilities. A detailed explanation of these problems and of the purposes contemplated by the "freeze" order has been set

forth in the Commission's brief in the companion group of consolidated cases, headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and is incorporated into this brief by reference.

The Commission stated that the interim procedures adopted by this "freeze" order related to matters of practice and procedure before the Commission, and that proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, was not required.[3/] Commissioner Hyde dissented, stating that he thought the adoption of the interim procedure was "essentially a substantive policy decision and ought to be the subject of a public notice before decision" ("Jones, R. 4).

The interim "freeze" procedures were incorporated as the following Note to Section 1.354 of its Rules (47 CFR 1.354):

> §1.354 Processing of standard broadcast applications.
>
> * * * * *
>
> NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.
>
> (a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§3.24, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

3/ Section 4 of the Administrative Procedure Act, in pertinent part, is set forth in the Appendix hereto.

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in §3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in Section 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

In adopting the "freeze" order of May 10, 1962, the Commission superseded an Order, released February 5, 1962, In re Clear Channel Broadcasting in the Standard Broadcast Band. FCC 62-117, 21 Pike & Fischer, R.R. 1843, which had lifted an existing "freeze" on certain Class I-B frequencies.

B. Applications Tendered For Filing By The Appellants.

Following the release of the Commission's Report and Order of May 10, 1962, the Commission received numerous petitions seeking reconsideration of the Commission's action in imposing the "freeze", as well as tenders of applications accompanied by petitions or letters requesting reconsideration

(Jones, R. 24, 37-42). The applications and petitions of the four appellants were included among these tenders. The background of each appellant's case is set forth below.

1. Robert A. Jones and Lloyd Burlingham, d/b as McHenry County Broadcasting Co., Woodstock, Illinois.

On May 16, 1962, Robert A. Jones and Lloyd Burlingham, d/b as McHenry County Broadcasting Co., Woodstock, Illinois (Jones), through their attorneys tendered to the Commission an application for a construction permit for a new standard broadcast station to operate at Woodstock, Illinois, on a frequency of 930 kc, with power of one kilowatt (Jones, R. 6, 7). At that time Jones stated that it was recognized that this application did not appear to be consistent with the criteria established by the "freeze" order, and requested the opportunity to file a brief setting forth the reasons why the application should be accepted and considered by the Commission (Jones, R. 6).

Jones filed a petition for acceptance of his application on June 22, 1962 (Jones, R. 10-23), stating that his proposed station would provide a first local service and a first primary nighttime service for Woodstock, Illinois, and would serve 918,672 persons during the day, and 26,146 persons at night (Jones, R. 10-11). Jones requested waiver of the "freeze" order and acceptance of his application on the grounds that he had commenced work on his application on November 25, 1961, and could have completed it by April 3, 1962, except that

he decided to await notice of approval of a local zoning hearing with respect to his proposed transmitter site (Jones, R. 11-12): that he had incurred substantial expenses in the preparation of his application totaling more than $8,000.00, and had undertaken obligations under the lease of his transmitter site amounting to $3,600.00 (Jones, R. 12); and that his application was not mutually exclusive with any application listed by the Commission prior to May 10, 1962, and that he was taken entirely by surprise by the "freeze" order, and should not be penalized as a result (Jones, R. 14).

Jones further stated that the Commission's "freeze" order was invalid and unlawful in that it affected the substantive rights of applicants and of the general public, and that to the extent that this order permitted the processing of applications filed before May 10, 1962 and excluded mutually exclusive applications tendered thereafter, the "freeze" operated in violation of Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, and of the holding of Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (Jones, R. 15-18).

2. DuPage County Broadcasting, Inc., Elmhurst, Illinois.

On June 1, 1962, DuPage County Broadcasting, Inc., Elmhurst, Illinois (DuPage), through its attorney tendered to the Commission an application for a construction permit for a

new standard broadcast station to operate at Elmhurst, Illinois, on a frequency of 1530 kc, with 250 watts power, daytime only (DuPage, R. 6). This submission was unaccompanied by any request for waiver of the "freeze" order.[4/]

3. Frederick Eckardt, d/b as Mansfield Broadcasting Company, Mansfield, Ohio.

On June 15, 1962, Frederick Eckardt, d/b as Mansfield Broadcasting Company, licensee of standard broadcast station WCLW, Mansfield, Ohio (Eckardt), through its attorney tendered to the Commission an application for authority to change the operating frequency of station WCLW from 1570 kc to 1140 kc, utilizing one kw power daytime and 500 watts power at night (Eckardt, R. 6). Eckardt submitted with this application a petition for reconsideration of the Commission's "freeze" order of May 10, 1962, and for waiver of the order to permit the acceptance of Eckardt's application (Eckardt, R. 7-16). In support of this petition Eckardt stated that he had been induced to file for the frequency 1140 kc by the Commission's Order released February 5, 1962, which lifted the existing "freeze" on this frequency (Eckardt, R. 8); that he had

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4/ In DuPage's Notice of Appeal, filed with this Court on November 8, 1962, DuPage stated that Elmhurst, Illinois, is a community of 36,991 persons, located in DuPage County, Illinois, with a population of 313, 459; that there is no standard radio station located in this County. DuPage further stated that it could have filed its application as early as January 1962, but that it waited until completion of negotiations with the Illinois Highway Commission for a transmitter site. DuPage claimed that it had invested over $3,000.00 in connection with its application.

had his application under active consideration since February 7, 1962, and that he had spent substantial sums of money in the preparation of his proposal (Eckardt, R. 8). Eckardt further stated that his proposal would provide service to areas and populations which currently were receiving co-channel interference from other stations, and that 169,055 "or over 100% more persons" would reside within WCLW's proposed 0.5 mv/m contour (Eckardt, R. 9). Eckardt pointed out that WCLW operating on 1140 kc would cause no co-channel or adjacent channel interference to any other existing station or pending application, that it would receive no co-channel interference from any other station, and would cause a de minimum amount of adjacent channel interference to 3,689 persons or 1.12% of the population residing within WCLW's normally protected 0.5 mv/m contour (Eckardt, R. 9).

Eckardt asserted that the "freeze" order of May 10, 1962, was legally ineffective and invalid, and that there was no reasonable relationship between the "freeze" and the Commission's statutory duties to adminster the Communications Act in the public convenience, interest and necessity (Eckardt, R.11-13). Eckardt also requested waiver of the "freeze" order, stating that the public interest would be served by the grant of his proposal, that he had diligently worked to prepare his application since the frequency of 1140 kc had been unfrozen on February 5, 1962, and had spent substantial sums of money in good faith on this proposal (Eckardt, R. 15).

4. Good Music Broadcasting Company.

On June 8, 1962, Good Music Broadcasting Company, licensee of standard broadcast station WKTX, Atlantic Beach, Florida (Good Music), through its attorney tendered to the Commission an application for a construction permit to change its site and to increase its power from 1 kw daytime to 5 kw daytime (Good Music, R. 6). Good Music submitted with this application a petition for acceptance of the application, for waiver of the "freeze" order, and/or reconsideration of such order and other relief (Good Music, R. 8-17).

In support of this petition, Good Music asserted that the "freeze" order was illegal in that it violated the doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (Good Music, R. 9-10); that the "freeze" order involved substantive rights and not merely procedural matters (Good Music, R. 10-12); that the "freeze" order was discriminatory insofar as it did not apply to applications on file prior to May 10, 1962 (Good Music, R. 12-13). Good Music requested waiver of the "freeze" order, stating that its proposal would not cause or increase interference to any existing station, and in fact would reduce interference to WELE, an adjacent channel station; that this proposal would increase the population served from 235,524 people to 471,647 people, and would also improve the signal within the present service area of the station; and that waiver was in order because Good Music had expended con-

siderable money in taking field intensity measurements and otherwise making preliminary arrangements for its application (Good Music, R. 14-15).

C. The Commission's Memorandum Opinion And Order of October 10, 1962.

On October 10, 1962, the Commission, with Commissioner Hyde dissenting and issuing a statement, and Commissioner Henry not participating, adopted a Memorandum Opinion and Order (Jones, R. 24-43), which it released on October 15, 1962, denying numerous petitions and requests, including those of Jones (Jones, R. 39), Eckardt (Eckardt, R. 40), and Good Music (Good Music, R. 32), for acceptance of tendered applications. reconsideration of the "freeze" order, and/or waiver of the interim criteria adopted by such order. The tender of DuPage's application was not specifically listed in the above order because DuPage's tender was not accompanied by any petition for reconsideration and/or waiver of the "freeze", and this order by its terms was addressed particularly to petitioners seeking reconsideration or waiver of the "freeze" (Jones, R. 24).

A detailed statement of the Commission's action of October 10, 1962, and rationale therefor, and of its reasons for denying the petitions and requests of the appellants has been set forth in the Commission's brief in the companion group of consolidated cases, headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications

Commission, Case No. 17,363, and is incorporated into this brief by reference.

In the Appendix attached to the Memorandum Opinion and Order of October 10, 1962 (Jones, R. 37-42), the Commission specifically listed the names of Jones, Eckardt, and Good Music, and stated that the petitions and requests of each for reconsideration and/or waiver were denied (Jones, R. 36).

On October 17, 1962, the Commission addressed individual letters to Jones (Jones, R. 44), DuPage (DuPage, R. 31), Eckardt (Eckardt, R. 46), and Good Music (Good Music, R. 38), returning the respective applications of each as being inconsistent with the interim criteria contained in the "freeze" order. The Commission enclosed a copy of its Memorandum Opinion and Order of October 10, 1962 with each of these letters.

The appellants thereupon filed their respective appeals and petitions for review.

ARGUMENT

With one minor exception (in the brief of Robert A. Jones), the four appellants in this group of cases do not make any arguments of substance which were not made in the companion group of cases, headed by Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, No. 17,363, which are now pending. Since the four appellants herein all filed their applications on or after May 16, 1962, the day on which the "freeze" order was published by the Federal Register, none of these cases involves the question of whether the order could be made effective before publication as to those persons who had actual knowledge of it. In general, the parties argue that the freeze was substantive and therefore invalidly adopted because of failure to follow the rule making procedures prescribed by the Administrative Procedure Act; that it was arbitrary to adopt an immediate freeze without advance notice to parties who otherwise still had time to file their applications; and that it was arbitrary to apply the freeze to parties who had incurred substantial expense in a good faith preparation of applications.[5/] We believe that our brief in the companion group of cases, to which the Court and the appellants herein

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5/ The briefs of DuPage and Robert A. Jones, which were prepared by the same counsel, are substantially identical to each other, and to arguments made in the brief of Fleet Enterprises, the appellant in Case No. 17,369, in the companion group of cases.

are respectfully referred,[6] adequately presents the Commission's position on these points. Therefore, we will not repeat the arguments here.[7]

Robert A. Jones does raise one new point. He contends (Br. 13-15) that the Commission committed error in refusing to consider his petition for acceptance of his application. However, the Commission did consider and rule on the appellant's petition. The application of Robert A. Jones was tendered for filing on May 16, 1962, and was accompanied by a letter stating that a petition for reconsideration would later be filed (Jones, R. 7). While the Commission's Memorandum Opinion and Order of October 10, 1962 does have a footnote (Jones, R. 35, ftnote 20) indicating that additional petitions for reconsideration filed more than one month after publication of the "freeze" order were not being considered therein, the opinion makes quite clear that the Jones petition for acceptance was considered. Thus, it is specifically mentioned in an Appendix to the opinion which lists the petitions being ruled on (See Jones, R. 39).

As we mentioned in the argument in the companion group of "freeze" cases, the Commission rejected the requests for waiver based upon the prior expenditure of money in the preparation of a tendered application, or based upon an alleged

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6 / Copies of that brief are being served upon the parties together with this brief.

7 / The jurisdictional statement contained in the other brief is also applicable here.

community need for service beyond the need recognized in the exemptions to the "freeze" provided by the Commission. The request for a waiver submitted by Jones came within this ruling. The refusal of the Commission to waive the freeze for Jones and the other appellants herein, based upon the showings they made, was within the Commission's reasonable discretion.

CONCLUSION

For the foregoing reasons, the Commission's Order should be affirmed.

Respectfully submitted,

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel,

ERNEST O. EISENBERG,
Counsel,

W. HALE WATKINS,
Counsel.

Federal Communications Commission
Washington 25, D.C.

May 6, 1963

APPENDIX

STATUTES INVOLVED

Administrative Procedure Act, 5 U.S.C. 1001, et seq., as amended

Sec. 4 (5 U.S.C. 1003):

"Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.-

"(a) Notice.-General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) Procedures. - After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of §§ 7 and 8 shall apply in place of the provisions of this subsection.

"(c) Fffective Dates. - The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

"(d) Petitions. - Fvery agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

CONSOLIDATED REPLY BRIEF FOR APPELLANTS ROBERT A. JONES AND LLOYD BURLINGHAM, d/b/a McHENRY COUNTY BROADCASTING COMPANY, DUPAGE COUNTY BROADCASTING, INC., AND THOMAS C. FLEET, JR., JANE HARRISON FLEET and JOHN HUDSON FLEET, d/b as FLEET ENTERPRISES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17,379 and 17,481

ROBERT A. JONES & LLOYD BURLINGHAM,
d/b/a McHENRY COUNTY BROADCASTING CO.,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

Nos. 17,415 and 17,479

DUPAGE COUNTY BROADCASTING, INC.,
ELMHURST, ILLINOIS,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

Nos. 17,369 and 17,480

THOMAS C. FLEET, JR., JANE HARRISON
FLEET, and JOHN HUDSON FLEET,
d/b as FLEET ENTERPRISES,
Appellant-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent

Appeal from and Petition for Judicial Review of
Orders and Actions of the Federal Communications Commission

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal from and Petition for Judicial Review of
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CONSOLIDATED REPLY BRIEF FOR APPELLANTS ROBERT A. JONES AND LLOYD BURLINGHAM, d/b/a McHENRY COUNTY BROADCASTING COMPANY, DUPAGE COUNTY BROADCASTING, INC., AND THOMAS C. FLEET, JR., JANE HARRISON FLEET and JOHN HUDSON FLEET, d/b as FLEET ENTERPRISES

I. INTRODUCTORY STATEMENT

A reading of the briefs filed in this proceeding by the FCC and by the Department of Justice shows that the arguments advanced by the appellees are internally inconsistent and do not satisfactorily meet the challenge of appellants' case.[1] In this reply brief, we shall point out some of the inconsistencies in the government's case and also provide such answers as may be warranted to the arguments advanced by the FCC in support of the "freeze."

II. THE GOVERNMENT'S CASE IS INTERNALLY INCONSISTENT

The internal inconsistencies in the government's case serve to highlight and underscore the difficulties which face the government's attorneys in attempting to defend an action which was both arbitrary and unreasonable. On the one hand (Brief in Kessler group, n. 19), the Commission argues that its actions in this case were legislative, not judicial, and therefore did not require notice. The Justice Department, however, seems to disagree. It takes the position (Brief in Kessler group, p. 7) that the Commission has, in effect, denied the applications of the appellants and appellants "are aggrieved by the Commission action in denying each application and their aggrievement is crystallized in that action of the Commission." But clearly, the denial of an application is a judicial action, and cannot be taken without adequate notice, and without the hearing required by section 309(e) of the Communications act of 1934, as amended.

A similar inconsistency is found within the covers of the Commission's own briefs. It argues on the one hand that the freeze is purely a procedural action, and not a substantive action (Brief in

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[1] The term "appellant," as used herein, means "appellant-petitioner."

Kessler group, pps. 33-40) and therefore did not require rule making. Yet, in answering the contentions of the appellants Fleet and Portage, who contend that the Commission did not timely comply with the publication requirements for "procedural" rules, the Commission tells us (Brief in Kessler group, p. 66) that "because of the nature of a 'freeze,' there was now no procedure for Portage and Fleet to follow (on the contrary existing procedures were suspended)," and that the appellants are therefore not required by the freeze to resort to any new procedure. In point of fact, there was no new procedure to which the appellants could resort, because the freeze was a substantive action, accomplishing purely substantive rule changes. As such, the freeze could not be lawfully imposed without rule making. See Section 4 of the Administrative Procedure Act, and Section 1.211(a) of the Commission's own Rules and Regulations.

III. THERE IS NO LEGAL PRECEDENT SUSTAINING THE VALIDITY OF THE FREEZE

The cases cited by the Commission do not help its position. The Harvey Radio Laboratories and Mesa Microwave cases, referred to at page 43 of the Commission's brief in the Kessler group, were cases involving questions of unreasonable delay in acting upon applications. The question here is not whether the Commission has delayed unreasonably in acting upon applications because, of course, the Commission has never even accepted the applications tendered by the appellants! The question here is whether the Commission acted lawfully in imposing a freeze on the acceptance of virtually all applications for AM stations, without notice or hearing, and while continuing to process and grant applications filed prior to the "freeze" date.

The totality and sweeping effect of the freeze cannot be overemphasized. Although a reading of the Commission's brief might give the impression that there are many exceptions to the freeze, the fact is that the freeze has barred the filing of virtually all applications for

new standard broadcast stations. The so-called "interim criteria" actually allow the filing of applications for new stations in only two very limited circumstances. The first of these circumstances is in the event that an application is being filed for one of eleven channels in the far west, each of which can support but one station. The second exception is for applications which will serve 25% "white area" and cause no interference to any other stations. This criterion is so difficult to achieve from an engineering standpoint that, in the more-than-a-year during which the freeze has been in effect, only 4 applications have been filed for new stations in conformity with the freeze criteria.

Thus, unlike the freeze referred to in the Harvey Radio Laboratories case, the freeze under consideration here does not affect just a few scattered channels or frequencies, but rather an entire class of broadcast stations. An applicant cannot avoid the freeze by simply selecting some alternate, "unfrozen" channel.

Moreover, unlike past freezes imposed by the Commission in TV (Commission brief in Kessler group, pps. 37-38),[2] and the freezes mentioned in the Harvey Radio and Mesa Microwave cases, the AM freeze is a freeze on the acceptance of applications, not a freeze on grants.[3] Consequently, during the pendency of the freeze, it is quite possible for grants to be made to other applicants, which will forever bar a grant of the applications tendered by appellants, thereby depriving the appellants of their rights to a consolidated hearing with such applications, under the doctrine of Ashbacker Radio Corp. v. FCC, 326 U.S. 327.

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[2] Interestingly, the Commission cites no case in support of the validity of the freezes. Instead, it cites its own actions as precedent, on the apparent theory that such actions can be made lawful by simple repetition.

[3] Thus it is not a freeze of the "general type" mentioned in the first full sentence on page 38 of the Commission's brief in Kessler.

True, as the Commission argues (Brief in Kessler group, pps. 35-36), an application returned under a valid "cut-off" rule does not require a hearing. Ranger v. FCC, 111 U.S. App. D.C. 44, 294 F.2d 240; KFAB Broadcasting Co. v. FCC, 85 U.S. App. D.C. 160, 177 F.2d 40. The freeze, however, was not a valid cut off rule. Like the "cut off" procedure which this Court struck down in Ridge Radio Corporation v. FCC, 110 U.S. App. D.C. 277, 292 F 2d 770, the freeze lacked an indispensable element of due process, namely, notice.

The Commission's efforts (Brief in Kessler, n. 16) to distinguish the Ridge Radio case are unavailing. The Commission states that in Ridge, this Court held a "cut off" to be ineffectual, because the "cut off" notice did not properly apprise the parties of the effect of the rule. On this basis, the Commission contends that the requirement of notice, referred to in the Court's opinion in Ridge, is inapplicable here.

Actually, however, the situation in Ridge is practically identical to the situation here. Here, the Commission devised elaborate rules, specifying the manner in which AM applications would be processed, and establishing cut off dates. Unlike the procedures involved in Federal Broadcasting System, Inc. v. FCC (cited at page 36 of the Commission's Brief in Kessler), the procedures involved in this case were not merely informal, unpublished procedures for the internal management of the Commission. On the contrary, the procedures involved here were published for the whole world to read, so that potential applicants might rely upon them, and be informed of the deadline, if any,[4] by which their applications should be filed.

Like the appellants in Ridge, who were misled by a cut off notice which failed to give proper notice, the appellants here were misled by rules which the Commission seeks to abrogate without proper notice.

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[4] No deadline having been published with respect to the Jones and DuPage applications, these appellants were on notice that there was no deadline. Fleet's deadline, May 25, 1962, was established and published.

The fact that there may be no accrued property right in filing an application does not serve to distinguish the situation here from those referred to in the cases cited in appellants' briefs, concerning shortening of the statutes of limitations. Applicants before the FCC are entitled to due process of law, regardless of whether or not a property right is involved. See Ridge Radio Corporation v. FCC, supra.

IV. THE FREEZE IS INVALID AS AN UNLAWFUL RESTRAINT ON COMPETITION

Because of the sweeping effect of the freeze, it constitutes a violation of the doctrine of the Sanders Brothers Radio case, 309 U.S. 470, that broadcasting is to be left in the area of free competition. Appellants alleged in their briefs and notices of appeal that the freeze was preceded by private conferences between Leroy Collins, President of the National Association of Broadcasters, and Chairman Newton Minow, of the FCC, reportedly concerning alleged economic "overpopulation" of radio stations in the United States.

In its Brief, the Commission does not deny these allegations. But it insists that under the doctrine of Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F.2d 440, it can consider economic matters in allocating AM stations (Commission Brief in Kessler group, pps. 47-48).

Of course, the Commission is right in asserting that it may consider economics in AM allocations. We submit, however, that the Commission cannot lawfully impose a blanket limitation on new AM stations without running afoul of the basic principle that broadcasting must be left in the realm of free enterprise. In Carroll, this Court sustained the Commission's right to consider economic matters when hearing applications for new radio stations, to the extent that economic considerations bear on the quality of program service to be rendered by such a station. This Court said, in part:

> "So in the present case, the Commission has the power to determine whether the economic effect of a second license in this area would be to damage or destroy service to an extent inconsistent with the public interest. Whether the problem actually exists depends upon the facts, and we have no findings upon the point."

The difficulty with the current AM freeze is that the Commission has no facts upon which to predicate a freeze for economic purposes. The only proceedings of any kind held prior to the imposition of the freeze were one or more private conferences between Chairman Minow and an interested party — conferences, the substance of which has never been made public.

In order to determine whether economic factors dictate the denial of any application in any particular situation, it is evident that the Commission must hold a hearing to determine the facts. The current AM freeze serves to deny applications for new standard broadcast stations without a hearing, and therefore without substantial evidence to sustain the denial. And by virtue of the blanket denial of applications for an entire class of broadcast stations, existing AM stations (and applicants lucky enough to file before May 10, 1962) are afforded economic protection — regardless of the facts in any particular case — in violation of the basic principle that broadcasting should be open to free competition.

V. THE FREEZE WAS AN UNREASONABLE ACT

In addition to all of the other deficiencies affecting the freeze, it is fundamentally invalid simply because it is unreasonable. The "reasons" for the freeze, spelled out at pages 5 and 6 of the Commission's brief in Kessler, are senseless. The first reason advanced by the Commission — i.e., over-concentration of radio stations with resultant derogation of engineering standards — was unsupported by any substantial evidence and, in fact, when an Industry-FCC conference was held on January 8, 1963, the National Association of Broadcasters submitted engineering evidence

proving that on certain channels there was less derogation of engineering service today than had existed in 1940. In any event, there was no need whatever for a drastic freeze, in order to prevent "derogation of engineering standards." Whenever the Commission has before it for consideration an application or applications which threaten to "derogate engineering standards," it can simply comply with the provisions of Section 309(e) of the Communications Act, afford the applicants concerned an opportunity for a hearing and, if the evidence upon hearing indicates that a "derogation" is likely, the Commission can deny the offending applications, for non-compliance with its standards.

The second reason advanced for the freeze by the Commission -- i.e., inadequacy of its technical standards -- was again unsupported by substantial evidence. Moreover, the simple answer to inadequate technical standards is to hold rule making proceedings and adopt new standards; not to impose a rigid, arbitrary and precipitous "freeze" on all applications. There was no public emergency requiring such an action.

Finally, the simple answer to the third reason advanced by the Commission, i.e., concern over exceptions to and waivers of its engineering rules, was to simply stop making exceptions and stop granting waivers, if after hearing, it was found that such exceptions and/or waivers were unjustified. In fact, with respect to all of the reasons advanced by the Commission to support the freeze, there is one imposing and unavoidable answer, namely, that the Commission is under no obligation to grant any application which impairs its standards or violates its Rules. A "freeze" is totally unnecessary to protect against grants which have such an effect.

VI. CONCLUSION

Finally, we adopt the arguments of the other appellants in this proceeding, with respect to the need for the Commission to entertain and hear appropriate requests for waiver of its freeze. In addition, on behalf of appellant Fleet, we point out that if the "freeze" was procedural as argued by the Commission, Fleet was required to resort to an unpublished procedure in violation of Section 3(a) of the Administrative Procedure Act, namely, the procedure of filing on or prior to May 10, 1962. The fact that it was impossible for Fleet to comply with such a procedure because the Commission issued its freeze order on the very day when the freeze became effective, merely underscores the validity of our basic position that the freeze is not a procedural device at all, but substantive action. For a procedure with which nobody is able to comply is clearly substantive in its effect, and not "procedural" at all.

Respectfully submitted,

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Attorney for
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CONSOLIDATED JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17,379 and 17,481

ROBERT A. JONES & LLOYD BURLINGHAM,
d/b/a McHENRY COUNTY BROADCASTING CO., Appellant-Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

FEDERAL COMMUNICATIONS COMMISSION, Appellee-Respondent.

Nos. 17,421 and 17,483

FREDERICK ECKARDT, d/b/a MANSFIELD
BROADCASTING COMPANY, Appellant-Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

FEDERAL COMMUNICATIONS COMMISSION, Appellee-Respondent.

Nos. 17,415 and 17,479

DUPAGE COUNTY BROADCASTING, INC.,
ELMHURST, ILLINOIS, Appellant-Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

FEDERAL COMMUNICATIONS COMMISSION, Appellee-Respondent.

Nos. 17,424 and 17,478

GOOD MUSIC BROADCASTING COMPANY, Appellant-Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

FEDERAL COMMUNICATIONS COMMISSION, Appellee-Respondent.

On Appeals from and Petitions for Review of Orders of the
Federal Communications Commission

United States Court of Appeals

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On Appeals from and Petitions for Review of Orders of the
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JOINT APPENDIX

[Filed February 13, 1963]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. JONES and LLOYD BURLINGHAM, d/b as McHENRY COUNTY BROADCASTING CO., WOODSTOCK, ILLINOIS Appellant, v. FEDERAL COMMUNICATIONS COMMISSION Appellee,	)	Case No. 17,379
DUPAGE COUNTY BROADCASTING INC., ELMHURST, ILLINOIS Appellant, v. FEDERAL COMMUNICATIONS COMMISSION Appellee.	)	Case No. 17,415
FREDERICK ECKARDT, d/b as MANSFIELD BROADCASTING COMPANY, MANSFIELD, OHIO Appellant, v. FEDERAL COMMUNICATIONS COMMISSION Appellee.	)	Case No. 17,421
GOOD MUSIC BROADCASTING COMPANY, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	)	Case No. 17,424

* * * * *

GOOD MUSIC BROADCASTING COMPANY, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents	Case No. 17,478
DUPAGE COUNTY BROADCASTING INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents.	Case No. 17,479
ROBERT A. JONES and LLOYD BURLINGHAM, d/b as McHENRY COUNTY BROADCASTING CO., WOODSTOCK, ILLINOIS Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 17,481
FREDERICK ECKARDT, d/b as MANSFIELD BROADCASTING COMPANY, MANSFIELD, OHIO Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 17,483

PREHEARING STIPULATION

Counsel for the respective parties to the above-entitled appeals and petitions hereby stipulate as follows:

I. The questions presented by these appeals and petitions[1/] are as follows:

1. Does the Federal Communications Commission's "freeze" rule set forth in a "Note" following 47 CFR 1.354 constitute a substantive rather than a procedural rule change, and if so, was the Commission required to give notice and/or follow the public rule making procedure prescribed by Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003?

2. Did the Commission act arbitrarily and capriciously, and did it deprive each appellant[2/] of due process of law, when, without a hearing as provided in Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, it returned each appellant's application?

3. Does the Commission's "freeze" rule violate the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, that broadcasting is to be left in the area of free competition?

4. Did the Commission's failure to give any advance notice of the "freeze" constitute arbitrary and capricious action which deprived each appellant of due process of law?

5. Was the Commission's refusal to consider each appellant's application on its merits or to consider waiver of the "freeze"

1/ The word "appeal" as used herein refers both to appeals and to petitions for review.

2/ The word "appellant" as used herein refers both to appellants and to petitioners; the word "appellee" refers both to appellees and to respondents.

when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

6. Was there a reasonable relationship between the Commission's imposition of the "freeze" and its resultant return of appellants' applications on the one hand, and the rule making announced in the Commission's Report and Order of May 10, 1962, on the other hand?

7. With respect to Case Nos. 17,421 and 17,483 was the Commission arbitrary and capricious in refusing to accept appellant's application and in denying appellant's request for waiver in light of appellant's assertions that this application complied with all of the Commission's substantive rules, that is provided for an improved utilization of the frequencies involved, and that it would not preclude achievement of the Commission's objectives in the rule making proceedings announced in the Report and Order of May 10, 1962?

II. Briefs for appellants will be filed on or before March 20, 1963; briefs for appellee and intervor will be filed on or before April 25, 1963; appellants' reply briefs and joint appendix will be filed on or before May 7, 1963.

III. In preparing briefs, the parties shall, when referring to record material, indicate the page or pages in the original record where such material may be found. The pages of the joint appendix shall be consecutively numbered and shall, in addition, bear appropriate record page numbers so that the reference to the record material printed in the joint appendix may readily be found.

IV. Only such portions of each Notice of Appeal, Petition for Review, and of the Notice of Intention to Intervene as shall be designated by any of the parties shall be printed in the joint appendix.

It is the understanding of the parties that this stipulation is subject to any position which the Commission may take with respect to the jurisdictional questions raised by these proceedings.

Respectfully submitted,

/s/ Lauren A. Colby
* * *
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DuPage County Broadcasting, Inc.
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/s/ Robert F. Jones
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Mansfield, Ohio

/s/ John P. Bankson, Jr.
* * *
Counsel for Good Music
Broadcasting Company

/s/ Stanley S. Neustadt
* * *
Counsel for Reuben B. Knight

/s/ Lionel Kestenbaum
Department of Justice
* * *

/s/ Daniel R. Ohlbaum
Associate General Counsel
Federal Communications Comm.
* * *

February 5, 1963.

1
All Cases

FCC 62-516
18951

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

In the Matter of)
Interim Criteria to Govern)
Acceptance of Standard)
Broadcast Applications)

REPORT AND ORDER

By the Commission: Commissioner Hyde dissenting and issuing a statement.

1. The present rules governing assignment of standard broadcast facilities are virtually unchanged from those adopted two decades ago. Between 1945 and 1962, the number of authorized standard broadcast stations has grown from 955 to 3,871, and the fact of this tremendous growth coupled with the particular way in which the growth has occurred, has created problems which differ greatly from those anticipated when the present standard broadcast rules were adopted. As explained more fully in the paragraphs which follow, the Commission believes that an immediate need exists to examine the problems of standard broadcast assignment in fresh perspective. We believe that the time has come to re-study the standards under which we consider new and changed assignments and, as a first step toward this end, we find it necessary to bring a temporary, partial halt to our acceptance of applications for new and changed facilities.

2. To understand the difficulties we face today, it is necessary to refer, briefly, to the evolution of the standard broadcast service as it has developed since the Second World War. Pre-war radio service suffered from what the Commission recognized to be three principal deficiencies: lack of any local outlet in many communities

of substantial size, absence of competing local stations in communities that did have a facility, and substantial "white" areas in the Northeast, Midwest, South, and Far West. Accordingly, the goals the Commission sought to achieve in bringing about the post-war growth of radio were specifically directed toward fulfillment of these three needs. It was always recognized that, to some degree, providing local outlets and fostering competition were objectives inconsistent with the Commission's third aim, that of eradicating "white" areas, but, it was felt that a case-to-case balancing of the competing considerations would result in an assignment scheme reflecting relatively equal achievement in each area.

3. The hope for balanced achievement has not, however, been realized in fact. The standard broadcast service has grown so as to fulfill the Commission's first two objectives to an unexpected degree. A large majority of communities[1/] of 10,000 and over (and many with a population of under 10,000) have their own local outlets. There are few counties in the United States which do not have a choice of multiple signals. Multi-station communities have grown similarly, so that lack of competition in the standard broadcast band can no

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1/ Suburban communities within standard metropolitan statistical areas are not considered separate communities for the purpose of this analysis.

longer be regarded as a serious problem. At the same time, this tremendous proliferation of stations has occurred without significant reduction of "white" areas. The outlying areas which lacked primary service in 1946 have been reduced only a minute degree by the continual flow of new assignments. More than this, concentration upon the creation of multi-station markets has led to a derogation of

engineering standards, so that service rendered by existing stations in the outermost regions of their normally protected service areas has been impaired, future power increases to extend the interference-free contour over growing suburban populations are often rendered impossible, and the available channels for the establishment of new stations in growing under-served areas have been continually reduced in number.

4. In the face of this mounting problem, it becomes necessary to ask ourselves whether the present rules governing assignment of new and changed facilities, and the substantial body of precedent which has become intertwined with many of the rules, frustrate implementation of a more efficient pattern of station assignment. Properly, this question forms the core of the thorough reappraisal of the Standard Broadcast Rules which must become the subject of formal rule-making proceedings. It is possible at this time, however, to delineate at least two areas of major concern.

5. First, certain of the technical rules, entirely adequate when adopted, have lost their practical validity as the number of stations has grown. For example, presently employed RSS exclusion principles for calculating nighttime interference, which are effective if only a few stations enter the RSS limit, become progressively less precise as the number of interfering sources is increased. Again, levels of signal intensity required for residential and business areas of a particular community were predicated upon maintenance of a normally protected contour some distance from the center of the city served. When this contour is not maintained, it may no longer be said with certainty that the signal level required for city service is adequate to insure a sufficient signal under all conditions.

6. Second, and of greater importance, is the fact that, owing to intense concentration upon providing local outlets and competitive services, many of the most crucial standards have been impaired by built-in exceptions and by waivers. The two prime examples of this phenomenon are the rules most basically involved in the steady deterioration of the protected service area concept, i.e., the rules concerning interference which may be caused and which may be received by an applicant for new or changed facilities. Section 3.24(b) of the Rules provides that a new facility must not cause interference to existing stations unless the need for the new service outweighs the need for the service to be lost. Unfortunately, neither of the factors to be weighed takes into consideration, except most indirectly, the values inherent in maintaining what is ordinarily considered to be an adequate separation between stations. Since, most often in an individual case, a proposed new station will provide a new service to a considerably greater number of persons than reside in the area of interference, interference to existing stations, unless extra ordinary in amount, has not been a major factor leading to denial of applications. The rule concerning interference received by a proposed operation has

more directly involved a weighing of engineering considerations against non-engineering factors, again to the detriment of the former. Section 3.28(d)(3) provides that a proposed facility may receive no more than ten percent population loss by reason of interference within its normally protected contour. However, Section 3.28(d)(3) contains several significant exceptions which have permitted numerous grants of proposals receiving interference far in excess of ten percent. Beyond the exceptions, an ever-increasing number of non-engineering factors has been found to justify waiver of the Rule in individual cases, each

of which has been added to the body of precedent that inextricably merges with the Rule itself as it is applied in subsequent cases. The result has been a developing system of assignments that may be justified in terms of each individual case, but which, on the whole, bears little relation to the rational assignment system represented by the protected contour concept in undiluted form.

7. The Commission is convinced that the problems discussed above compel us to re-examine, immediately, the standards employed in assigning new or changed standard broadcast facilities. We propose to issue a notice of proposed rule making which will propose deeper exploration in many of the areas we have mentioned here. We will seek to determine, among other points, whether many technical portions of the rules continue to be useful tools under present conditions; whether many of the rules have been impaired by their built-in exceptions; whether the body of precedent which has grown up about the practice of granting waivers of certain sections has eroded the sections involved; and, as a result of these determinations and others, to what extent revision of the rules and of our practices would be appropriate. It will be necessary to ask basic questions concerning such matters as the present limits employed to define the normally protected contour of the various classes of stations, and to re-examine the concept of what constitutes a "community" for the purposes of allocating local services. Most significantly, we will need to ask whether, under present-day conditions, our station assignment principles should provide at all for a weighing of engineering standards against subjective non-engineering factors.

8. We feel that the first step necessary to permit an undertaking of the magnitude here involved is a partial halt in our acceptance of standard broadcast applications. This step is essential so that we may avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards. On

the other hand, we believe that procedural fairness requires that we complete processing those applications currently on file, although we take occasion to note, our consideration of these applications must take into account what we have said here and will reflect our desire to avoid unnecessary aggravation of the problems we have discussed. We believe, moreover, that we may continue to accept for filing certain defined categories of applications which would not frustrate the ends we seek to achieve by our re-study, or for which there are strong public interest considerations weighing in favor of acceptance. Accordingly, the interim processing criteria we adopt today provide for the continued acceptance of certain applications which would bring service to "white" areas and which would cause no interference to existing stations. We will also accept applications for new Class II-A facilities as specified in Section 3.22 of the Rules since, in the Clear Channel Proceeding, we have determined that

these new assignments would serve the public interest. Finally, the Commission feels that we must continue to accept most applications for Class IV power increases. Approximately 500 authorizations to increase the power of Class IV stations to one kilowatt have been granted to date, and, since the effectiveness of the general plan allowing Class IV power increases is dependent upon all such stations (except those restricted by international considerations) increasing power, it is essential that we continue to accept applications from those stations who have not yet increased power and which are, in many cases, suffering substantial interference from those Class IV stations which have been granted increases.

9. We also note at this time that the Commission's revision of the rules governing allocation in the FM broadcast service is nearing completion. The Commission suggests that potential applicants for facilities in the crowded standard broadcast band give serious consideration to the greater coverage possibilities provided, both day and night, in the FM band.

10. Since the interim procedure set forth in the appendix hereto relate to matters of practice and procedure before the Commission, proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act is not required. Authority for the adoption of the interim procedures is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, this 10th day of May, 1962, that Section 1.354 of the Commission's Rules IS AMENDED as set forth in the attached appendix, effective May 10, 1962.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Acting Secretary

Released: May 10, 1962

NOTE: Rules changes herein will be covered by T.S. I-19.

*Dissenting Statement of Commissioner Hyde

I think this is essentially a substantive policy decision and ought to be the subject of a public notice before decision.

5

All Cases

APPENDIX

Section 1.354 is amended to add the following Note:

§ 1.354 Processing of standard broadcast applications.

* * * * *

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests

for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in § § 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in Section 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

[Rec'd. June 22, 1962 - FCC]

Lauren A. Colby
Attorney at Law
* * *

June 22, 1962

Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, District of Columbia

Dear Mr. Waple:

Transmitted herewith are fifteen copies of "Petition for Acceptance of Application" submitted on behalf of McHenry County Broadcasting Co., an applicant for a new standard broadcast station to be operated on 930 kc, 1 kw, DA-2, in Woodstock, Illinois. The application was filed with the Commission on May 16, 1962. This petition requests that the Commission accept the application for filing and process it in accordance with the Rules and Regulations.

Should any further information be desired in connection with this matter, please communicate with the undersigned.

Very truly yours,
Lauren A. Colby,
By: /s/ Fred J. Eden, Jr.

[Rec'd. June 22, 1962 - FCC]

In re Application of	)	
Robert A. Jones and Lloyd Burlingham, d/b/a McHENRY COUNTY BROADCASTING CO. Woodstock, Illinois	)	File No.
For a construction permit for a new standard broadcast station	)	

PETITION FOR ACCEPTANCE OF APPLICATION

McHenry County Broadcasting Co., by its attorney, hereby requests that the Commission accept for filing and process the above-entitled application. In support whereof, it is respectfully stated as follows:

I. Facilities Requested

1. The McHenry County application requests a construction permit for a new standard broadcast station to operate on 930 kc, 1 kw, DA-2, in Woodstock, Illinois. If granted, the station would provide a first local service and a first primary nighttime service for Woodstock, Illinois.

2. The proposed operation would receive objectionable interference from stations WBCK, WTAD, WLBL and WAAF amounting to a loss of 8 per cent of the population within the proposed 0.5 mv/m daytime contour. Objectionable interference would be caused to about 0.1 per cent of the population of WAAF, Chicago, and 1.3 per cent of

the population within the proposed 0.5 mv/m contour of BP-12365, Shorewood Broadcasting Company, Fort Atkinson, Wisconsin. The nighttime limit for the proposed station would be to the 14.16 mv/m contour. The proposed operation would not raise the nighttime limit for any existing station.

3. The proposed station would serve 918,672 persons residing in an area of 4,000 square miles, daytime, and 26,146 persons in an area of 192 square miles, nighttime. The station will provide a first local channel and first nighttime primary service to the community of Woodstock, the County Seat of McHenry County, Illinois, a predominately rural and farming area in Northeastern Illinois. Detailed studies of Woodstock and McHenry County are given in Exhibit 1 of the application.

II. Good Cause Exists for Waiving the Provisions of Section 1.354 of the Rules and Accepting the Tendered Application

4. Attached hereto is the affidavit of Robert A. Jones, consulting engineer and a partner in McHenry County Broadcasting Co. The affidavit shows plans for the application were commenced on November 25, 1961, and that the application was prepared and submitted in an orderly course in reliance on the Commission's Rules and Regulations and the provisions of Section 309 of the Communications Act of 1934, as amended. Steps taken in the preparation of the application included the following:

a. Initial conferences between the partners, November and December, 1961.

b. Location of antenna site, December to February, 1962.
c. Negotations for lease, February and March, 1962.
d. Zoning hearing, March 27, 1962.
e. Notice of approval of zoning request, April 29, 1962.
f. Site photographs, May 9, 1962.
g. Engineering studies, design of directive antenna system, etc., December through April, 1962.

5. The affidavit also shows that, in reliance on the Commission's Rules and Regulations and the provisions of the Act, the applicant has incurred substantial expenses in the preparation of its application, including engineering and personal services amounting to $7,500.00, out-of-pocket expenses and other professional fees amounting to $664.54, and a minimum obligation under the lease of the transmitter site for $3,600.00.

6. The application was completed on May 12, 1962, and filed with the Commission on May 16, 1962. The affidavit shows that the application could have been completed by April 3, 1962, had there appeared to be any reason for hurrying completion, and that the reason filing was withheld until May was that the applicant had decided to await notice of approval of the zoning hearing with respect to its proposed site, rather than file without approval and amend later, if necessary.

7. Examination of the application itself, which includes a detailed area survey, a comprehensive statement of

program plans and policies, specifically worked out plans for service to the rural and agricultural areas involved and major centers of population near Woodstock, and a complex engineering proposal, shows that the application was not undertaken in haste or for the purpose of meeting any specific deadline imposed by the Commission. Indeed, as shown by the affidavit of Mr. Jones, more than five months of the most intensive effort went into the formulation of the application.

8. While the applicant can understand and, in fact, sympathize with the Commission's position with respect to the general standard broadcast situation, it is also certain that the Commission did not intend for its May 10, 1962 Order to impose the kind of hardship and

inequity which would be caused if this application were to be rejected on the pure technicality that it was not submitted for filing on or before May 10, 1962. The fact is that the McHenry County application was substantially complete and ready for filing long before May 10, 1962, and very substantial expenses had been incurred in the preparation of the application long before the May 10th Order. The only reason the application was not filed earlier was the desire of the applicant to assure itself of zoning approval for its antenna site, and, of course, the security of dealing with the Commission's Rules as they stood prior to May 10, 1962. The application was not mutually exclusive with any application listed by the Commission prior to that date, and nothing indicated to the applicant that it should have

proceeding in other than the normal course of events to get its application ready for filing. It was taken entirely by surprise by the action of the Commission in freezing standard broadcast applications and should not be penalized as a result. A just and equitable application of the Rule would be to look to the substance of the McHenry County application and accept it for filing inasmuch as it was substantially complete and ready for filing prior to the May 10, 1962, cut-off date.

9. In this way, the Commission could apply its Rule in order to accomplish its purpose and at the same time not cause hardship and inequity to those persons who had proceeded, at length, to prepare and submit applications in reliance on the existing Rules. As the Commission knows, an application is a finished product, not a beginning step, for the applicant. As in the case of the McHenry County application, where complicated engineering matters are involved, and the applicant conscientiously attempts to deal with community needs, the preparation of an application can be an enormous task and

involve expenditure of great amounts of time and money. Obviously, the Rule should not preclude applicants who have engaged in this kind of effort for the sake of establishing a cut-off date, by itself. Otherwise, the Commission would be in the uncomfortable position of having urged applicants to prepare their applications carefully and in accordance with the Rules and policies and then, in a moment, cutting off such effort simply on the basis of a technicality.

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Jones

Where, as in the case with McHenry County, it is shown that the application was substantially completed prior to the May 10, 1962 Order, and great hardship would be caused by rejection of the application, the provisions of Section 1.354 of the Rules should be waived to permit the acceptance and processing of the application.

III. In Any Event, the Commission's Order of May 10, 1962, is Invalid and Unlawful

10. The Commission has indicated in its Order of May 10, 1962, that the Rule is procedural in nature and applies only to the Commission's method of processing applications. It is argued that the Rule is not substantive in application and therefore, no formal rule-making or notice was required in order to promulgate the Rule in question. This, of course, is a factual question and it can be shown quite clearly that substantive rights of applicants and the general public have been affected, notwithstanding the opinion of the Commission.

A. The Rule Adversely Affects Members of the General Public

11. As shown above, McHenry County had been engaged in the preparation of its application since November 25, 1961. All steps taken in this connection were in reliance on the Commission's Rules

respecting allocation of frequencies, power, station location, interference considerations, and the like, and the Rules

with respect to times for filing in competition with other applications. Similarly, the preparation of the application was undertaken in reliance on Section 309 of the Act, giving to this applicant and all other members of the public the right to apply for radio facilities and imposing on the Commission the duty to consider such applications on their merits. In its simplest sense, the Commission's Order of May 10, 1962, purports to destroy and nullify all efforts by the public to comply with the provisions of the Rules and the Act on the basis of the pure technicality that applications were not filed by May 10. Since all applications require prior effort and commitment before filing, a simple cut-off date, without more, affects every member of the public who had expended time, effort and funds on the preparation of applications prior to the date on which the Order was issued. Since, prior to the May 10th Order any member of the public had the right to rely on theRules, it cannot be argued that the Rule applies only to the way in which the Commission processes applications, especially since a filing date is only the culmination of effort for any applicant.

12. Therefore, it is clear that the provisions of Section 4 of the Administrative Procedure Act apply to the Rule in question and it was unlawful of the Commission to promulgate the Rule in question without notice and appropriate proceedings. Moreover, anyone who had even an idea of applying for a station has been prejudiced by the Commission's action. Until

May 10, 1962, it was perfectly lawful for any member of the public

to think about applying for a station, take his time about having a frequency search made, inquire as to the legal requirements from his attorney and engineering requirements from his engineer, and generally to consider all of the possibilities in this connection. Thus, the Rule has application also to all persons who might apply for stations, without regard to the legitimacy of such applications under other existing substantive Rules of allocation. Since the Rule was substantive in nature on its face, it was incumbent upon the Commission to abide by the provisions of the Administrative Procedure Act and give notice of its intent and opportunity to members of the public to comment on the substance of the Rule prior to its adoption. Inasmuch as this was not done, the Rule is clearly invalid.

B. The Rule Adversely Affects Substantive Legal Rights of Applicants

13. The Rule promulgated by the Commission purports to allow processing of existing applications while prohibiting the filing of new applications in accordance with the same Rules and standards. Therefore, it permits the processing of applications filed before May 10 and excludes mutually exclusive applications filed thereafter without regard to the merits of the mutually exclusive application. This is clearly in violation of Section 309 of the Act and the Ashbacker doctrine. In this respect, the freeze is no freeze at all, but an outright denial of the rights

of competing applicants. Since there was no notice of the action of the Commission, and no opportunity on the part of members of the public to file applications in competition with previously filed applications, it is clear that the standard of reasonableness established in the Ashbacker case has been ignored and that the Commission has also overlooked the provisions of the Administrative Procedure Act in this important area.

C. The Rule Permits Wholesale Violation of the Ashbacker Rule in the Future

14. The Rule of May 10, 1962 applies only to applications for new facilities or major changes. It does not apply to amendments to existing applications. Therefore, it is perfectly possible for the Commission to accept and process an amendment which would seriously affect the Ashbacker rights of other prospective applicants barred by the "freeze." Thus, although the application of McHenry County is not now in mutually exclusive conflict with another application, there is nothing in the Commission's Rule to prohibit the filing of an amendment to an existing application which would preclude future consideration of the McHenry application. In fact, the Rule in practice would appear to permit such filings and refuse to take into consideration the McHenry application. This is an obvious violation of the Ashbacker doctrine and is another example of the way in which the precipitous action of the Commission is invalid.

D. Promulgation of the Rule Involved Off-the-Record Conferences with Members of the Industry to the Exclusion of Members of the General Public

15. Following release of the general order by the Commission, it was disclosed in the public press that the Commission had conferred about the freeze order with members of the NAB. Moreover, since the promulgation of the Order, the Commission has continued to confer with NAB representatives concerning the freeze and the steps to be taken with respect to AM standards in future rule-making proceedings.

16. Obviously, the NAB has represented a privileged group with respect to this matter. No one else was invited to confer with the Commission, and no one had any notice, whatever, that the Commission was about to impose a freeze on AM applications.

17. The difficulty in permitting the NAB to advise and consult with the Commission in connection with this matter is readily seen, when it is pointed out that the NAB represents less than one-third of all AM broadcasters, none of the prospective applicants in the general public and certainly only a handful of the more than 900 applicants now on file with the Commission. Of course, it is the rights of each of these groups which are being decided in this proceeding.

WHEREFORE, THE PREMISES CONSIDERED, McHenry County Broadcasting Co. respectfully requests the Commission to accept its application for filing and to process the said application in accordance with the existing Rules and Regulations.

Respectfully submitted,

McHENRY COUNTY
BROADCASTING CO.,

Lauren A. Colby, Its Attorney,

By: /s/ Fred J. Eden, Jr.

* * *

June 22, 1962

[Certificate of Service]

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Jones

AFFIDAVIT

Robert A. Jones, being first duly sworn, deposes and says:

1. That he is a 25% partner in a partnership known as McHenry County Broadcasting Company which was formed for the purpose of applying for a construction permit for a new standard broadcast station in Woodstock, Illinois.

2. That he has had a major responsibility for preparing the aforesaid application of McHenry County Broadcasting Company and has personal knowledge of the circumstances surrounding the preparation and filing of that application.

3. That on the 25th of November, 1961 he first corresponded with Lloyd Burlingham to discuss the filing of an application for a new station in Woodstock.

4. That on the 15th of December 1961 he and Burlingham had reached a final partnership understanding and had definitely decided to go forward with the filing of an application for Woodstock.

5. That by the first week in February, 1962 a suitable antenna-transmitter site had been located for the Woodstock proposal so that on March 24, 1962 McHenry County Broadcasting Company entered into a firm lease agreement with McHenry County Fair Association for the lease of such antenna-transmitter site.

6. That on March 24, 1962 work on the engineering part of the application and other aspects of the application had

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Jones

progressed so far that the application could easily have been completed and filed with the Federal Communications Commission no later than thirty days from the March 24 date and probably as early as ten days

from said date, had any necessity or reason appeared for the filing of the application within such a time period.

7. That the only reason why the application was not finalized and submitted very shortly after the March 24 date was that it was necessary for a hearing to be held on March 27, 1962 to consider rezoning of the antenna-transmitter site to permit its use for such purpose.

8. That, although McHenry County Broadcasting Company had every reasonable assurance and was morally certain that the zoning hearing would result in the grant of permission to use the antenna-transmitter site as proposed, it considered it desirable to wait until such approval had been obtained before submitting the application to the Federal Communications Commission and planned to submit evidence of the zoning approval to the Commission with its application.

9. That zoning approval for the proposed antenna-transmitter site was given on April 17, 1962 but that notice of such approval was not given to McHenry County Broadcasting Company until on or about April 29, 1962.

10. That, upon receipt of notice of such approval McHenry County Broadcasting Company went forward immediately to finalize its application.

11. That on May 9, 1962 site photographs were taken which was the last step required and constituted the last bit of information needed in order to permit the filing of a complete and entire application for Woodstock.

12. That it was the intention of the McHenry County Broadcasting Company to have these photographs back by May 11 or May 12 and to mail the application to its attorneys on May 12 with the understanding that it was to be filed with the Federal Communications Commission on May 14 or May 15.

13. That, in reliance upon the published procedures and organization of the Federal Communications Commission providing for the acceptance and consideration of an application such as McHenry County Broadcasting Company prepared from November, 1961 to May, 1962 and filed with the Commission on May 16, 1962, McHenry County Broadcasting Company expended a total of $664.54 for the following: Photostats, Photographs, Travel Expense, Telephone Calls, Zoning & Legal Fees, and Misc. Expenses; and incurred additional expenses of $3,600.00 for a one year lease on the antenna-transmitter site; as well as expending a very considerable amount of time and effort to the preparation of the application including engineering services reasonably to be valued at $7,500.00.

/s/ Robert A. Jones
Affiant

Subscribed and sworn to before me this 22 day of May, 1962.

/s/ Carolyn L. Jones
Notary Public

My commission expires: Nov. 29, 1965 (SEAL)

Jones - 24
Eckardt - 26
Dupage - 11
Good Music - 18

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

FCC 62-1052
25490

In the Matter of)
)
Interim Criteria to Govern)
Acceptance of Standard)
Broadcast Applications)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting and issuing a statement; Commissioner Henry not participating.

The Commission has before it for consideration numerous petitions and letters seeking reconsideration of the Commission's action of May 10, 1962, (FCC 62-516, 23 R.R. 1545) establishing a temporary, limited halt in the acceptance of standard broadcast applications.[1/] In addition, the Commission has before it numerous applications tendered after May 10, 1962, accompanied by petitions or letters requesting reconsideration of the interim criteria.[2/] Since, it many cases, petitions nominally seeking waiver of the rule have challenged its legality, the Commission is considering here all requests for reconsideration or waiver received by June 15, 1962. The various

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1/ A single petitioner, the Federal Communications Bar Association, has also requested that the Commission stay the effectiveness of its order pending decision on the petitions for reconsideration and has requested oral argument before the Commission, en banc. The Commission does not believe that oral argument will materially assist in the resolution of the issues now before us and will deny the request. Moreover, since we have not taken dispositive action with regard to any application conflicting with an application filed by a petitioner herein, we have seen no need to stay the effective date of our Order.

2/ These applications are all inconsistent with the interim criteria and fall into one or more of four major categories:

(a) Applications tendered prior to May 15, 1962, the date copies of the May 10th Report and Order were filed with the National Archives and Record Service and made available for public inspection.

(b) Applications filed on or before May 25, 1962, involving substantial interference with applications listed in the Commission's Public Notice, FCC 62-419, "cut-off-list" number 33.

(c) Applications involving substantial interference conflicts with proposals filed on or before May 10, 1962, which proposals have not yet received "cut-off" protection pursuant to Sections 1.354 and 1.106 of the Rules.

(d) Applications not involving substantial interference conflicts with any proposal filed on or before May 10, 1962.

Jones - 25
Eckardt - 27
Dupage - 12
Good Music - 19

letters, petitions, responsive pleadings and applications involved are set forth in the Appendix to this Opinion. 3/

2. The contentions advanced in the various pleadings may be divided into three general groups. In the first group are the various arguments to the effect that the Commission's action was, in whole or in part, unlawful. Secondly, several petitioners contend that, apart from questions of legality, the interim criteria should be modified or changed in one or more respects. Finally, nearly all petitioners contend that, should the Commission leave the interim criteria undisturbed, the rule should be waived in view of particular compelling reasons present in each case. Having considered the contentions advanced, we conclude, as set forth more fully below, that (a) the Commission's action was not unlawful, (b) no justification exists for the requested modifications in the interim criteria and (c) all applications not consistent with the interim criteria must be returned to the applicants. 4/

LEGALITY OF THE REPORT AND ORDER

3. Petitioners' contentions that the interim criteria are unlawful in whole or in part are, essentially, divisible into three sub-categories. It is claimed, first, that the May 10th Report and Order was not adopted in accordance with applicable statutory law and is therefore wholly ineffective; second, that the effective date of the amended rules was earlier than allowed by law; and, finally, that the amended rules cannot be made effective as to certain applicants involving conflicts with other applications filed on or before May 10, 1962. The Commission has carefully considered each of the contentions above and has concluded that each must be rejected.

4. The most basic attack mounted against the May 10th Report and Order is the contention that the Commission's action was "substantive" rather than "procedural" and that, therefore, the rule changes could not be effected without full compliance with the formal rulemaking requirements of the Administrative Procedure Act, Section 4.[5/] Except for the statement that certain potential applicants will be denied "Ashbacker rights" -- a

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[3/] One applicant, Cape Canaveral Broadcasters, Inc., has also filed a petition to deny a competing application which was on file prior to May 10, 1962. The Commission will adhere to its usual practice and will consider this petition when the application at which it is directed is considered in normal course.

[4/] One petitioner, Paul E. Taft d/b as Taft Broadcasting Company, has claimed that its tendered application seeks only a "minor change" and, therefore is not barred by the freeze. Examination of the application, which seeks to increase power from one to five kw, indicates that the change sought is a major one. Accordingly, we consider Taft's "contingent" request for waiver herein.

[5/] The Administrative Procedure Act, 5 U.S.C. §1003, sets forth requirements as to notice of proposed rulemaking, procedures for adoption of rules, and the prerequisites to effectiveness of rules so adopted. However §1003(a) specifically exempts "rules of agency . . . procedure and practice" from the notice requirements and §1003(c), dealing with the

effective date of newly adopted rules, refers only to "substantive" rules. In our Report and Order of May 10th, we stated that "the interim procedures set forth in the appendix hereto relate to matters of practice and procedure before the Commission . . ."

Jones - 26
Eckardt - 28
Dupage - 13
Good Music - 20

contention we will discuss separately herein -- no authority has been cited in support of this view. Instead, petitioners assert generally that the Commission's action has "a substantial and important impact" on private and public interests[6/] and dwell at length upon the effect of the Commission's action on particular applicants, rather than upon the nature of the action itself.

5. It is an inescapable fact that some private interests will be affected by almost any rule change, procedural or substantive. It has been recognized by the U. S. Court of Appeals for the District of Columbia, however, that the effect of a particular rule change on individual parties does not determine the categorization of the action involved. In Radio Cabrillo v. F.C.C., 294 F2d 240 (D.C. Cir. 1961), the Court sustained the Commission's cut-off rule[7/] against an attack similar to that made here, noting specifically that:

> . . . all procedural requirements may and do sometimes affect substantive rights, but this possibility does not make a procedural regulation a substantive one.[8/]

Thus, the effect of a regulation on particular parties is not a reliable guide in determining whether or not the rule is "substantive". It is necessary, instead, to look at the rule itself.

6. Substantive rules are those which change standards of station assignment and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business. There is, however, no fixed and immutable standard which would allow

us to determine, from the bare words of a particular regulation, whether the rule falls within the first category or the second. The determinative factor is the context within which the rule was promulgated and, flowing from this context, the essential purpose of the rule. Viewing the interim criteria in terms of these factors, it is clear that the purpose of the "freeze" was not the establishment of new allocation standards without public participation in rule making but, to the contrary, the creation of conditions under which formal rule making proceedings can be held in an effective, efficient, and meaningful manner. In the Report and Order adopting the interim criteria, we noted explicitly that the deteriorating situation in standard broadcast allocations would require a formal rule making proceeding. We also recognized, however, that such a rule making proceeding, possibly of extended duration, could have little meaning if we continued to allocate new stations under the old rules, thus intensifying the very problems our rule making sought to remedy. In this specific context, the

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6/ FCBA Petition.

7/ Sections 1.106, 1.354, and 1.361 of the Commission's Rules.

8/ Radio Cabrillo, supra, at 244.

Jones - 27
Eckardt - 29
Dupage - 14
Good Music - 21

Commission concluded that a temporary limited halt in the acceptance of standard broadcast applications was a necessary adjunct to any efficient and effective rule making. We believe the manner in which we chose to meet anticipated problems surrounding our rule making proceeding represented a necessary and proper exercise of our discretion in this area.9/ Since the interim criteria created no new station assignment standards

but were, rather, primarily concerned with the effective functioning of Commission processes, the AM "freeze" was procedural in nature and not subject to the formal rule making requirements of the Administrative Procedure Act.

7. The second major contention advanced by various petitioners and applicants is that, assuming the rule change to be procedural, the rule could not be effective as to any applicant filing prior to publication in the Federal Register.[10/] In support of this view, petitioners cite Section 3 of the Administrative Procedure Act (5 U.S.C. § 1002), and the Federal Register Act, 44 U.S.C. §307. Section 3 of the Administrative Procedure Act provides, in relevant part:

> Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available as well as forms and instructions as to the scope or contents of all papers, reports, and examinations; . . . No person shall in any manner be required to resort to organization or procedure not so published.

The Federal Register Act, 44 U.S.C. §307, states:

> No document required under Section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate original or certified copies of the Document shall have been filed with the Division and a copy made available for public interest as provided in Section 302 of this title.

Petitioners contend that the sections cited above render nugatory the May 10th, 1962, effective date we had assigned the interim criteria and that, accordingly, the earliest possible effective date was May 15, 1962.

9/ The Court of Appeals, in Radio Cabrillo, supra, observed that the Commission's "cut-off" rule had been developed to meet problems created

by the Ashbacker doctrine and that "the manner of coping with the difficulty lies within the discretion of the Commission, so long as its solution is reasonable." Radio Cabrillo v. F.C.C., 294 F 2d 240, 244 (D.C. Cir. 1961). Paragraphs 11-14, infra, consider the reasonableness of the freeze as applied to particular applicants.

10/ The Report and Order was filed for publication with the Federal Register at 8:45 a.m., May 15, 1962.

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8. The Commission agrees that publication of the May 10th Report and Order was required under the statutes cited above. We do not agree, however, that publication was a precondition to effectiveness with regard to any of the few applicants who tendered substantially complete applications prior to May 15, 1962. At 3:00 p.m. on May 10, 1962, the Commission made available for distribution at its offices the complete text of the Report and Order adopted earlier that day. In addition, a public notice accompanying the full document summarized the Report and Order and quoted, verbatim, the operative sections of the interim criteria. Each of the applications tendered prior to May 15, 1962, now carries with it some written indication that the applicant, the applicant's attorney, or both, had read at least the public notice prior to the time the application was tendered for filing. Under these circumstances, the Federal Register Act does not preclude effectiveness as to these applicants since the Act, as quoted above, equates "actual knowledge" with publication as a precondition to effectiveness with regard to a particular party. Nor do we believe that Section 3 of the Administrative Procedure Act requires a different result. The Administrative Procedure Act contains no independent definition of "publication." The purpose of Section 3(a), however, is essentially the same as that underlying the Federal Register Act -- i.e., making information available to the public, particularly in areas where

actions of government agencies affect private interests. In light of this essential identity of underlying policy, it appears most reasonable to consider the publication requirements of Section 3(a) of the Administrative Procedure Act as defined by the earlier statutory language contained in Section 307 of the Federal Register Act. Thus read, the actual knowledge of the applicants here involved becomes determinative and they cannot be held to have been required to resort to "unpublished" procedure. See Eastern Air Lines v. Union Trust Company, 95 U.S. App. D.C. 189, 221 F2d 62, (D.C. Cir. 1955).

9. A single petitioner, WLOD, Inc., (WLOD) has raised a different argument with regard to the effective date of the interim criteria. WLOD contends that Section 408 of the Communications Act prohibits the Commission from issuing any "order" to be effective in less than thirty days. Section 408, in relevant part, reads as follows:

> Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days after service of the order, and shall continue in force until its further order or for a specified period of time, according as shall be prescribed in the order, unless the same be suspended or modified or set aside by the Commission, or set aside by a court of competent jurisdiction.

WLOD's reliance on Section 408 is mistaken. This Section, as well as Section 407, which must be read concurrently with 408, was incorporated from the Interstate Commerce Act in 1934. The section was, in our opinion, intended to apply

only to cases in which an order has been directed at a specific party,[11/] and, during the past twenty-eight years, Section 408 has been so applied. The wording of the section itself reinforces this interpretation inasmuch as it bars effectiveness sooner than "thirty days after service of the order." Accordingly, we conclude that Section 408 does not apply to an "order" effecting a change in procedural rules of general applicability.

10. The final challenge to the legality of the freeze order comes from those petitioners tendering applications claimed to be mutually exclusive with other proposals filed prior to May 10, 1962, which latter applications had not yet been afforded "cut-off" protection under previously applicable Commission Rules. These applicants claim that rejection of their proposals will contravene the mandate contained in Section 307(b) of the Communications Act, since the applications now tendered may well represent a more efficient distribution of radio service than mutually exclusive proposals already on file. Moreover, these petitioners contend, failure to accept their applications and consolidate them for hearing with the mutually exclusive proposals on file will deprive the petitioners of "Ashbacker rights."

11. The Commission does not accept these contentions. We have noted earlier that the interim criteria of May 10, 1962 represented procedural rule changes made necessary by a forthcoming standard broadcast rule making proceeding. Since the rule change is a procedural one, the fact that some potential applicants may be substantially affected does not determine the propriety of the action. The real question raised by the group of applicants here considered is whether or not the procedural changes embodied in the interim criteria are reasonable ones. We believe, as set forth more fully below, that the rule changes were reasonable and that the particular form they assume is necessarily related to the discharge of our statutory obligations.

12. As explained in paragraph 6, supra, the Commission concluded that a meaningful rule making proceeding concerning standard broadcast assignment could not be held if we continued to accept and grant, at the same time, applications which would only aggravate the very problems we were trying to solve. Having reached this initial conclusion, it became necessary to determine the nature and extent of the "freeze" necessary to accomplish our objectives. Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file, (excluding Class IV power increases), was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the

11/ Apparently a specific common carrier. Cf Section 407, which complements 408 in certain respects and which specifically applies to "a carrier."

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equitable considerations inherent in those cases, without substantial sacrifice of our basic objectives.[12/] At the same time, however, we recognized that any further acceptance of new applications would raise the number of grants to an intolerable level and, accordingly, it was concluded that we must exercise our administrative discretion so as to bar such new applications.[13/] It was further concluded that if a freeze were to be put into effect it must be done without delay since, on the basis of past experience, it was expected that any substantial postponement would result in a flood of several hundred hastily prepared applications. Therefore, we amended our procedural rules to establish, in effect, a new "cut-off date" for most pending applications, this new date acting to supersede all previous cut-off lists.

13. Only in this specific context can we properly consider petitioners' arguments based on Section 307(b) of the Communications Act. Section 307(b) requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the standard broadcast service, Section 307(b) has most often been invoked in the past when it has been necessary to choose between competing applications proposing mutually exclusive operations with substantially different service areas. Utilization of 307(b) in this relatively narrow "adjudicatory" sense, however, must not be allowed to obscure the fact that the Commission has an even greater obligation to develop an overall plan under which stations are assigned at any particular time so as to insure a "fair, efficient, and equitable distribution" of facilities.[14] It

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[12] It is clear that the Commission could have taken an alternative route and simply withheld action on all standard broadcast applications during the pendency of this rule making proceeding. See Harvey Laboratories, Inc. v. F.C.C. United States, 289 F 2d 458 (D.C. Cir. 1961), which upheld an extensive, but reasonable delay in acting upon an application owing to the "freezes" occasioned by pending NARBA ratification, the Daytime Skywave proceedings, and the Clear Channel proceedings. The rules under which action was deferred pending completion of the latter two proceedings were adopted as procedural regulations, without notice of rule making. See the Commission's Order of December 4, 1950, 15 F.R. 9065. See also Mesa Microwave Inc. v. F.C.C., 105 U.S. App. 1, 262 F2d 723 (D.C. Cir. 1958).

[13] Several defined categories of applications were excepted from the freeze on the ground that their acceptance could in no way frustrate the objectives we seek to accomplish through our rule making. See the Report and Order adopting the interim criteria, 23 RR 1545; 1547.

[14] It is well settled that the Commission may narrowly limit the range of adjudicatory activities in the allocation field through use of the general rule making powers. See Logansport Broadcasting Corporation v. United States, 93 U.S. App. D.C. 342, 210 F2d 24 (D.C. Cir. 1954).

is precisely because we have found an urgent need to re-examine the regulations which produce our overall plan of assignment that it has been necessary to institute a proceeding looking toward revision of the AM rules.

14. Several applicants contend, however, that acceptance of their proposals would not add to deterioration of the AM service since they wish to file proposals mutually exclusive with applications already on file. Thus, these petitioners argue, the total number of possible grants would not be increased. This argument is not borne out by the facts. The petitioners advancing this particular argument have failed to consider the inevitable development of "chains" of interlinking mutually exclusive proposals. The chain problem is far from a fanciful possibility, a fact which must be acknowledged by anyone familiar with recent hearing proceedings involving groups of twenty or more applications spread over wide areas of the country, linked together by interference considerations.[15/] The following examples are illustrative of the type of problem to be anticipated if we were to accept new applications "mutually exclusive" with proposals already on file.

(a) A was on file prior to the freeze and B seeks to file an application after May 10, 1962, for a new facility in a different city but on the same frequency as A. Are A and B mutually exclusive? It is often impossible to determine, prior to hearing, whether two applications for different communities are "mutually exclusive". Many applications resulting in some degree of mutual interference are granted concurrently under our present rules. Thus, it may be impossible to predict, when B tenders his application, whether its acceptance would result in two grants rather than one.

(b) A was on file prior to the freeze. Prior to A's cut-off date, B and C file applications for stations on the same (or adjacent) frequency as A, but in different cities. B and C may prove to be "mutually exclusive" with A but not with each other, again raising the possibility of multiple grants where one had been possible before.

(c) A and B, both on file before the freeze, propose mutually exclusive operations in different cities. C, filing after the freeze, proposes a new facility in A's city, but utilizes a different directional antenna pattern (or lower power) so that the C proposal is not mutually exclusive with B's. It is now possible

15/ See, e.g., Community Service Broadcasters, Incorporated, et al, (FCC 61-1204); Saul M. Miller, et. al (FCC 61-1473).

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to grant both C and B, rather than A or B. Thus, even though C has applied for a station in the same city as A, it is still possible to increase the number of potential grants.

(d) A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities identical to those sought by A.

The examples given above have been reduced to their simplest terms for purposes of illustration. In practice, it is to be expected that these problems would often occur in combination and attain considerable complexity. Confronted with these possibilities, and having decided that we will continue to process applications filed prior to May 10, 1962, the Commission

concludes that the only reasonable and effective means of accomplishing our objectives is to bar all applications tendered after May 10th which are not consistent with the interim criteria.

15. The Ashbacker case[16/] has been cited by most petitioners as a further ground compelling acceptance of applications mutually exclusive with proposals on file. We do not believe the case is in point. In Ashbacker, the Supreme Court held that a hearing is required between two co-pending, mutually exclusive applications and that the Commission's action granting the first of the two applications without hearing must be set aside. It is important to note, however, that Ashbacker was concerned with two applications which were already on file with the Commission. The Supreme Court noted expressly that:

> Apparently no regulation exists which, for orderly administration, requires an application for a frequency previously applied for, to be filed within a certain date.

The recent decision of the U. S. Court of Appeals in Radio Cabrillo v. F.C.C., 294 F2d 240 (D.C. Cir. 1961), demonstrates that when a reasonable regulation establishing a "cut-off" date does exist, no "Ashbacker rights" arise on the part of a late filing applicant. The Commission believes that the regulation adopted on May 10, 1962, was a reasonable one under the circumstances, and a necessary correlative to the forthcoming standard broadcast rule making proceeding.

16. The discussion above is applicable to all parties tendering applications after May 10th, who claim mutual exclusivity with other applications filed before that date. It is necessary to give special consideration, however, to an additional argument advanced by the limited group of petitioners

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16/ Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945).

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claiming conflicts with applications on the Commission's "cut-off list" number 33, released April 19, 1962, listing applications ready and available for processing on May 25, 1962, (hereinafter the "May 25th list"). These petitioners assert that the Commission's action changing the effective cut-off date to May 10th was arbitrary, capricious, and contrary to principles set forth by the U. S. Court of Appeals in Ridge Radio Corporation v. F.C.C., 110 U.S. App. D.C. 277, 292 F2d 770 (1961). Several variants of this argument have been submitted: the first to the effect that the freeze is ineffective as to any applicant filing prior to May 25th, since the cut-off list was, in effect, a representation that the Commission would accept applications until at least that date; the second that the freeze is ineffective as to any applicant having a potential conflict with an application on the list. (The latter contention is based upon the possibility of the pre-May 25th filing of an application or applications which would act to link a proposal on the list with petitioner's proposal, itself not in conflict with the listed proposal.)

17. This argument may only be evaluated upon a comparison of the problems giving rise to the "cut-off" rule with the circumstances compelling us to impose the present "freeze." The rules establishing the cut-off list procedure were adopted at a time when the Commission's processes were becoming hopelessly clogged with late filing standard broadcast applicants seeking comparative consideration with prior-filed applications pursuant to the Ashbacker doctrine.[17/] The primary purpose of the rules was to enable the Commission to clear the logjam of applications threatening to paralyze our processes, (and not, as petitioners appear to infer, to confer new private rights on potential applicants.)[18/] The present freeze, on the other hand, resulted from an entirely different set of problems which, we believe, are of transcending importance. As

we have noted at some length, these problems concern the adequacy of the basic rules under which we discharge our allocations function in the standard broadcast field. In view of the importance of the issues involved, we concluded that we must suspend our normal procedures concerning the acceptance of applications. This action was far from "arbitrary and capricious," but, in the present context, a completely necessary measure directly linked to the discharge of our statutory obligations.

17/ For a discussion of the tremendous processing problems confronting the Commission at the time the cut-off procedure was adopted, see the Report and Order amending Sections 1.106, 1.354, and 1.361 of the Rules, 18 RR 1565 (1959).

18/ In the Report and Order adopting the cut-off procedure we noted specifically that the cut-off date set by public notice was not necessarily the final date upon which a competing application could be filed. We stated:

> "Thus, the date fixed by the Public Notice is no guaranty that an application will be entitled to consideration with listed applications if filed by that date, but rather is the last possible filing date for comparative consideration even if the earliest filed application has not been acted upon by that time. Potential applicants, as in the past, must be guided in their decisions as to filing their applications by the public notices of the acceptance for filing of competing applications and the status of the processing line." 18 RR 1565, 1567.

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18. Ridge Radio does not require a different result. In Ridge it was held only that the particular form of a cut-off notice then employed by the Commission was defective, inasmuch as it failed to advise a potential applicant that proposals involving an indirect conflict with a listed application must be filed by that application's cut-off date. No such question is involved in the present case. It is clear that, pursuant to Sections 1.361(c) and 1.354(c) of the Rules, any application listed on the May 25th

list could have been granted or designated for hearing on or before May 10, 1962. Since the freeze order was, in effect, an equivalent action, reasonably related to a specific public interest objective, we do not believe that the particular group of petitioners here considered has suffered the loss of any legal right. 19/

REQUESTED MODIFICATIONS IN THE INTERIM CRITERIA

19. Several petitioners have submitted alternative requests that the interim criteria be modified to some degree. For the most part, these requests for partial reconsideration seek additional categories of exception for those applications in direct, indirect, or potential conflict with one or more applications on file before the freeze. These requests will be denied for reasons similar to those given in the preceding paragraphs. A single petitioner, Radio Orange County, Inc., has requested that the interim criteria be modified to permit acceptance of applications for improved facilities by Class II stations operating on Class I-B channels. Radio Orange submits that the Commission's "Further Supplement" to the Clear Channel Decision removed restrictions as to certain applications by Class II stations on I-B channels and constituted an "invitation" to file such applications for much needed improvements in existing facilities. The Commission does not feel that petitioner's position is essentially different than that of most potential applicants. The interim criteria represent a temporary measure to be kept in effect during the pendency of rule making proceedings looking toward revision of the AM rules. Radio Orange, and other potential applicants in the same position, will be able to file its application following conclusion of the rule making proceeding if the application is consistent with the standard broadcast rules then put into effect.

REQUESTS FOR WAIVER

20. Nearly every petitioner tendering an application has submitted a request for waiver of the interim criteria. In general, the requests are based upon one or both of the following reasons:

19/ Our conclusions above would also dispose of the contentions advanced by petitioners claiming potential conflicts with proposals on the May 25th list, or claiming that any application filed prior to May 25th must be accepted. We wish to make it clear, however, that even if we were to accept applications mutually exclusive with May 25th proposals, we would not accept any other applications not involving an actual direct or indirect conflict with a listed application. It is our opinion that petitioners claiming only potential conflicts are in no different position than any other applicant whose arguments for acceptance are in no way based on the May 25th list.

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(a) The petitioner has invested substantial amounts of time and money in the preparation of a tendered application. The application was nearly complete when the freeze went into effect.

(b) The tendered application proposes a much needed service, though not complying with any of the exceptions to the freeze listed in the interim criteria. Failure to accept the application will result in great hardship in a particular community.

21. We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). We note additionally that the grant of any one of the waiver requests involved here would not be justifiable vis-a-vis most of the others since the factual gradations between the cases are

generally small.[20/] To embark upon a wholesale grant of waiver requests would obviously destroy the ends we sought to accomplish in adopting the interim criteria. We feel that what we said in the May 10th Report and Order in connection with the practice of granting individual waivers of Section 3.28(d)(3) of the Rules is equally pertinent here:

> Beyond the exceptions, an ever-increasing number of non-engineering factors has been found to justify waiver of the Rule in individual cases, each of which has been added to the body of precedent that inextricably merges with the Rule itself as it is applied in subsequent cases. The result has been a developing system of assignments that may be justified in terms of each individual case, but which, on the whole, bears little relation to the rational assignment system represented by the protected contour concept in undiluted form.[21/]

In short, insofar as the requests for waiver are based upon the private hardship of the petitioner, we cannot, in view of our overall obligation to serve the public interest, make further exceptions; insofar as the requests are based upon a public need, we feel it necessary to delay fulfillment of that

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[20/] In addition to the petitions and letters requesting waiver listed in the attached appendix, numerous additional requests have been received since June 15, 1962 -- the cut-off for petitions considered in this opinion.

[21/] 23 RR 1545, 1547. (1962).

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need in individual cases so that a better overall plan for assigning standard broadcast stations in the public interest may be devised. We believe that we must consider the totality of our obligations in connection with

any requests for waiver and viewing the requests in this perspective, we conclude that each must be denied.

CONCLUSIONS

In view of the foregoing, IT IS ORDERED that the petitions and requests listed in the attached Appendix, which seek reconsideration and/or waiver of the interim criteria adopted May 10, 1962, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Acting Secretary

Attachment

Adopted: October 10, 1962

Released: October 15, 1962

* See attached dissenting statement of Commissioner Hyde

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APPENDIX

A. Petitions for Reconsideration of the Report and Order of May 10, 1962, (FCC-62-516) filed prior to June 16, 1962, and unaccompanied by a tendered application:

(1) Federal Communications Bar Association: "Petition for Reconsideration, Request to Set Aside Action Taken By It and/or To Stay Effectiveness of Its Order, and Request for Oral Argument" Filed May 25, 1962.

(2) Raymond I. Kandel: "Petition for Reconsideration." Filed June 11, 1962.

B. Applications tendered prior to June 16, 1962, which are inconsistent with the Interim Criteria adopted by the Report and Order of May 10, 1962, (FCC-62-516) and which are accompanied by petitions or letters seeking reconsideration and/or waiver of the Interim Criteria:

Key to Symbols:

* Application tendered prior to May 15, 1962.

\+ Claimed that application is mutually exclusive with an application filed prior to May 10, 1962.

++ Claimed that application is mutually exclusive with an application filed prior to May 10, 1962, and listed on Public Notice FCC-62-419, "the May 25th cut-off list."

(1) James D. Brownyard *+

(a) Application for new station at North East, Pennsylvania, tendered May 14, 1962.

(b) Letter, submitted with application, requests acceptance despite non-compliance with interim criteria.

(2) George W. Burwell, et al d/b as Triangle Electronics +

(a) Application for new station at Selma, North Carolina, tendered May 25, 1962.

(b) "Petition of Triangle Electronics for Acceptance of Application for Filing," submitted same date.

(3) Cape Canaveral Broadcasters, Inc. ++

(a) Application for new station at Eau Gallie, Florida, tendered May 25, 1962.

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(b) "Petition for Acceptance of Application for Filing, for Waiver of Section 1.354 and/or Reconsideration of Order Amending said Section, and for Other Relief," submitted same date.

(c) Opposition to petition above, filed June 5, 1962, by R. A. Vaughn and Thomas R. Hanssen, d/b as Vaughn-Hanssen Company.

(d) Reply to Opposition, submitted June 14, 1962, by petitioner.

(4) Capital Broadcasting Corporation

(a) Application for new station at Barnesville, Ohio, tendered May 15, 1962.

(b) "Petition for acceptance of application," submitted same date.

(5) Frederick Eckhardt d/b as Mansfield Broadcasting Company

(a) Application to change frequency of station WCLW, Mansfield, Ohio, tendered June 15, 1962.

(b) Petition requesting reconsideration or waiver of the interim criteria, submitted June 15, 1962.

(6) Gold Sonics Incorporated ++*

(a) Application for a new standard broadcast station at Midland, Texas, tendered May 11, 1962.

(b) Letter from applicant's attorney requesting reconsideration or waiver of the interim criteria, submitted same date.

(7) Good Music Broadcasting Company

(a) Application requesting increase in power and change in site for Station WKTX, Atlantic Beach, Florida, tendered June 8, 1962.

(b) "Petition for acceptance of application for filing, and waiver of Section 1.354 and/or reconsideration of Order, amending said Section and other relief," submitted same date.

(8) F. K. Graham tr/as Coast Broadcasting Company

(a) Application to increase the daytime power of Station WGOO, Georgetown, South Carolina, tendered June 15, 1962.

(b) "Petition of Coast Broadcasting Company for acceptance of application for filing," submitted same date.

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(9) Arthur Griener and G. W. Winter ++

(a) Application for a new station at Palmyra, Pennsylvania, tendered May 25, 1962.

(b) Letter from applicant requesting waiver of the interim criteria.

(10) Heart of Georgia Broadcasting Company, Inc. +

(a) Application for a new standard broadcast station at Gordon, Georgia, tendered May 17, 1962.

(b) Letter from applicant's attorney requesting reconsideration or waiver of the interim criteria, submitted same date.

(11) Indianola Broadcasting Co.

(a) Application for a new standard broadcast station at Indianola, Mississippi, tendered May 25, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(12) Robert A. Jones and Lloyd Burlingham d/b as McHenry County Broadcasting Company.

(a) Application for a new standard broadcast station at Woodstock, Illinois, tendered May 16, 1962.

(b) Letter accompanying application stating intention to file petition for reconsideration, submitted same date.

(c) "Petition for acceptance of application," submitted June 25, 1962.

(13) Joseph J. Kessler tr/as WBXM Broadcasting Company

(a) Application for a new standard broadcast station at Springfield, Virginia, tendered May 25, 1962.

(b) "Petition for acceptance of application," submitted same date.

(c) "Petition for partial reconsideration," submitted June 15, 1962.

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(14) Keyser Broadcasting Corporation ++

(a) Application for a new standard broadcast station at Keyser, West Virginia, tendered May 23, 1962.

(b) Accompanying letter and statement requesting waiver of the interim criteria.

(15) Reuben B. Knight +

(a) Application for a new standard broadcast station at Wichita Falls, Texas, tendered May 18, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(16) L&S Broadcasting Company

(a) Application for a new standard broadcast station at Jacksonville, North Carolina, tendered June 12, 1962.

(b) "Petition to accept application for filing, and for waiver of Rule 1.534," submitted same date.

(17) Meramec Valley Broadcasting Company

(a) Application for a new standard broadcast station at Sullivan, Missouri, tendered June 11, 1962.

(b) "Petition for acceptance of application for filing, for waiver of Section 1.354 and/or reconsideration of order, amending said Section and/or for other relief," submitted same date.

(18) Oconee Broadcasting Co., Inc.

(a) Application to increase power of Station WGOG, Walhalla, South Carolina, tendered June 13, 1962.

(b) "Petition to accept application for filing," submitted same date.

(19) Platinum Coast Broadcasters Inc. ++

(a) Application for a new standard broadcast station at Eau Gallie, Florida, tendered May 24, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

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(c) Opposition to request for waiver, submitted June 5, 1962, by R. A. Vaughn and Thomas Hanssen d/b as Vaughn-Hanssen Company.

(d) Reply to opposition, submitted June 13, 1962.

(20) Portage Broadcasting Company *

(a) Application for a new standard broadcast station at Portage, Michigan, tendered May 14, 1962.

(b) "Petition of Portage Broadcasting Corporation for acceptance of application for filing," submitted same date.

(c) Supplement to petition above, submitted May 17, 1962.

(21) Radio Orange County Inc.

(a) Application for increase in power of Station KEZY, Anaheim, California, tendered May 17, 1962.

(b) "Petition for acceptance of application," submitted same date.

(c) "Petition for partial reconsideration," submitted June 6, 1962.

(22) Radio Rockford Inc.

(a) Application to change site, antenna pattern, and add nighttime operation, tendered May 25, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(23) Seminole Broadcasting Company

(a) Application to increase power and to install directional antenna for Station WSWN, Belle Glade, Florida, tendered June 8, 1962.

(b) "Petition for waiver of Section 1.354 of the Commission's Rules and Regulations, and request for acceptance of application for filing," submitted same date.

(24) Paul E. Taft d/b as Taft Broadcasting Company*

(a) Application to increase power of Station KODA, Houston, Texas, tendered May 14, 1962.

(b) "(Contingent) petition for waiver of Rule 1.354(b)," submitted same date.

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(25) Tri-State Broadcaster's +

(a) Application for new standard broadcast station at Sioux Center, Iowa, tendered June 1, 1962.

(b) "Petition for waiver," submitted same date.

(26) WLOD Inc. +

(a) Application to increase the power of Station WLOD, Pompano Beach, Florida, tendered June 11, 1962.

(b) "Petition for waiver of Section 1.354 of the Rules, and acceptance of application," submitted same date.

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DISSENTING STATEMENT OF
COMMISSIONER ROSEL H. HYDE

I dissent to the Memorandum Opinion and Order denying the petitions and other requests for reconsideration of the Commission's Report and Order of May 10, 1962 (FCC 62-516) in the matter of "Interim Criteria to Govern Acceptance of Standard Broadcast Applications."

The order of May 10, 1962, was issued without notice of proposed rule making and was made effective the date of issuance, affording no opportunity for consideration of views of interested parties as to the merit of the order and no advance notice as to its effective date. The order said that the new rules related to matters of practice and procedure and that notice and rule making in accordance with the Administrative Procedure Act were not required.

The petitions to reconsider which have been filed refer, among other matters, to a number of applications which were prepared or were in process of preparation in reliance upon criteria which had been in effect for many years. They represent substantial investments in funds and efforts. However, under the new "interim criteria" they are summarily rejected. Each applicant is told that the rejection is without prejudice to resubmission when the interim criteria are no longer in effect provided the proposal would be consistent with substantive rules then in force. No notice of proposed rule making has been issued looking toward promulgation of such new substantive rules. In the meantime, the Commission will continue to accept and act upon applications which comply with what it terms "interim criteria." Grants thus made may well present engineering obstacles to grants of rejected applications should they later satisfy new rules yet to be devised. The new criteria which the rejected applications failed to meet require in specific terms that new stations with certain exceptions must bring service to relatively underserved areas. This test did not appear in the now superseded rules; it introduces a new standard for allocating new stations. It is substantive in character according to the following definition from paragraph 6, first sentence of the majority opinion:

> "Substantive rules are those which change standards of allocation and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business."

The Commission should reconsider its order and comply with the spirit and letter of Section 4 of the Administrative Procedure Act.

Jones - 44

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.
October 17, 1962

In Reply Refer To:
8720

[Broadcast License Div.]

Robert A. Jones and
Lloyd Burlingham d/b as
McHenry County Broadcasting Company
R. R. #1
Woodstock, Illinois

Gentlemen:

Returned herewith is your application tendered For filing May 16, 1962 requesting a construction permit for a new standard broadcast station to serve Woodstock, Illinois.

Preliminary examination of your proposal indicates that the application is not consistent with the interim criteria contained in the "NOTE" to Section 1.354 of the Commission's Rules.

On October 10, 1962, the Commission denied various petitions requesting reconsideration or waiver of the interim criteria adopted by Report and Order of May 10, 1962. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962 is enclosed for your information.

Your application is returned without prejudice to its later resubmission when the interim criteria are no longer in effect, provided, of course, that the proposal would be consistent with the substantive rules in force at that time.

Very truly yours,

Ben F. Waple
Acting Secretary

* * *

[Received June 15, 1962 - FCC]

LAW OFFICES OF
ROBERT F. JONES
515 PERPETUAL BUILDING
1111 E STREET, N.W.
WASHINGTON 4, D. C.
MEtropolitan 8-6632

June 15, 1962

Mr. Ben F. Waple
Acting Secretary
Federal Communications Commission
Washington 25, D. C.

Dear Mr. Waple:

On behalf of Frederick C. Eckardt, d/b/a Mansfield Broadcasting Company, licensee of Standard Broadcast Station WCLW, Mansfield, Ohio, there is transmitted herewith the following:

1. Application (in triplicate) on FCC Form 301 for authority to change the operating frequency of said station from 1570kc to 1140kc, utilizing lkw power daytime except during critical hours power will be reduced to 500 watts.

2. Fifteen (15) copies of a Petition for Reconsideration of Report and Order Amending Section 1.354 of the Commission's Rules, to Postpone the Effectiveness of said Report and Order, for Waiver of said Rule as Amended and for Acceptance of the above application for filing and processing.

3. Fifteen (15) copies of a Petition for Leave to File a Petition for Reconsideration and Other Relief, referred to in paragraph 2 above.

It is noted that the information required under Section V-G of FCC Form 301 is already on file with the Commission and is incorporated in this application without change.

Should any questions arise in connection with this matter, please communicate directly with this office.

Yours very truly,

Law Offices of Robert F. Jones

By /s/ Robert F. Jones
Attorney for
Frederick C. Eckardt, d/b/a
Mansfield Broadcasting Company

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Eckardt

[Received June 15, 1962 - FCC]

PETITION FOR RECONSIDERATION OF REPORT AND ORDER AMENDING SECTION 1.354 OF THE COMMISSION'S RULES TO POSTPONE THE EFFECTIVENESS OF SAID REPORT AND ORDER, FOR WAIVER OF SECTION 1.354 AS AMENDED BY SAID REPORT AND ORDER, AND FOR ACCEPTANCE OF APPLICATION FOR FILING.

Frederick C. Eckardt, d/b/a Mansfield Broadcasting Company, licensee of Class II radio station WCLW, 1570kc, 1kw, DA-D, Mansfield, Ohio, herewith respectfully requests that the Commission: (1) reconsider its Report and Order of May 10, 1962, adding a footnote to Section 1.354 of its Rules which simultaneously imposed a freeze on the acceptance for filing and processing of applications for new standard broadcast stations or for major changes in existing standard broadcast facilities; or (2) stay the effectiveness of said Report and Order; or (3) waive Section 1.354 of its Rules as amended by said Report and Order; and pursuant thereto accept for filing and process his application being filed with the Commission simultaneously with this Petition to change the operating frequency of said station to 1140kc, 1kw, DA-D. This petition is filed pursuant to Sections 308 and 309 and Section 405 of the Communications Act of 1934, as amended, pursuant to Sections 1.11, 1.15 and 1.191

of the Commission'a Rules, and Sections III and IV of the Administrative Procedure Act, 5 U.S.C. 1003, 1004. In support thereof, the following is shown:

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Eckardt

STATEMENT OF FACTS

1. Petitioner was initially authorized to operate radio station WCLW, Mansfield, Ohio and to commence operation in December 1957 on the frequency 1570kc, with power of 250 watts, daytime, utilizing a directional antenna. On November 22, 1960 the Commission authorized Petitioner to increase the power of said station on the same frequency with a modified directional antenna. Construction was completed, and Petitioner's application for license to cover construction permit was granted on March 19, 1962.

2. For some years prior to February 5, 1962, the frequency 1140kc inter alia was frozen pending a final determination of the Clear Channel proceedings in Docket 6741. On said date, the Commission issued a Further Supplement to Report and Order in Docket 6741 (FCC 62-117) in which it amended Section 1.351(b) of its Rules to provide for acceptance and consideration of applications on twenty channels including 1140kc which are adjacent to Class I-A channels to be duplicated or unduplicated pursuant to the Commission's Report and Order in said Docket issued on September 30, 1961 (FCC 61-1106). Petitioner immediately employed his consulting engineer to study the possibility of applying for one of the frequencies released for acceptance and consideration by the Commission. Accordingly, Petitioner has had its application, tendered simultaneously herewith, under active consideration since February 7, 1962; and it has spent substantial sums of money for engineering work, alternate site antenna array surveys until the proposal tendered herewith was determined as the only feasible method of improving the coverage of WCLW. Petitioner submits his application herewith at the earliest

date that it could be prepared and filed since the frequency 1140kc was unfrozen. Said application

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Eckardt

requests authority to change the operating frequency of said station from 1570kc to 1140kc, DA-D utilizing WCLW's presently authorized antenna system, with 1kw power except during critical hours (two hours after sunrise and two hours before sunset) when power will be reduced to 500 watts.

3. Petitioner has supplied full and complete responses required by the Commission's application form (FCC Form 301), the Rules and Regulations of the Commission and the Communications Act. On its FACE the application shows that a grant would provide service to areas and populations which now receive co-channel interference from WPTW, Piqua, Ohio (1570 kc, 250W, D), and adjacent channel interference from WTNS, Coshocton, Ohio (1560kc, 1kw, D), and that 169,055 or over 100% more persons would reside within WCLW's proposed 0.5mv/m contour. The existing service of WCLW will be extended in all directions and the service areas of WPTW, Piqua, Ohio and WTNS, Coshocton, Ohio will be materially and substantially improved by a grant of Petitioner's application. WCLW operating as proposed on 1140kc will cause no co-channel or adjacent channel interference to any other existing station or pending application. It will receive no co-channel interference from any other station. WIMA [redacted] will cause a de minimum amount of adjacent channel interference TO [redacted]3,689 persons or 1.12% of the population residing within WCLW's normally protected 0.5mv/m contour.

THE PROPOSAL COMPLIES WITH SECTION 1.351
OF THE COMMISSION'S RULES

4. The Engineering Exhibit of Petitioner's application shows that there are no Class I-A channels 10kc and 30kc adjacent to the

frequency 1140kc. KMOX, St. Louis, Missouri, 1120kc, 50kw, unlimited, is the Class I station assigned to this channel which is proposed to be duplicated by a new Class II-A

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Eckardt

assignment in California or Oregon. Petitioner's Engineering Exhibit shows that the KMOX 0.5mv/m contour fails to encompass the WCLW side by 260 miles and said site lies within the KMOX 50%, 0.5mv/m skywave contour. Accordingly, Petitioner's proposal complies with the application of Section 1.351 of the Commission's Rules with reference to the Class I-A frequency 1120kc.

5. KSL, Salt Lake City, Utah, is the Class I-A station assigned to 1160kc, 20kc adjacent to Petitioner's proposal. The Commission's Report and Order of September 13, 1961 in Docket 6741 reserves the channel either for duplication by Class II assignment 500 miles beyond the KSL 50%, 0.5mv/m contour or to permit KSL to operate with an elevation of maximum power above 50kw. Petitioner's Engineering Exhibit shows that the frequency is already duplicated by Station WJJD, Chicago, Illinois, 1160kc, 50kw, DA-1, L-KSL, and this station is located in the approximate area where any new Class II-A station might be located and forecloses such assignment in the states of Michigan and Ohio on a basis where Petitioner's proposal would preclude such station.

Moreover, protection requirements of existing stations WIMA, Lima, Ohio, 1150kc, 1kw, DA-N; WCUE, Akron, Ohio (CP for Cuyahoga Falls, Ohio), 1150kc, 1kw, D; WCAR, Detroit, Michigan, 1130kc, 50kw-D, 10kw-N, DA-2; and WRVA, Richmond, Virginia, 1140kc, 50kw, DA-1 preclude the assignment of a new Class II-A assignment in central Ohio where the WCLW proposal would be a factor preventing such an assignment. Accordingly, Petitioner's proposal complies with the Section 1.351 of the Commission's Rules with reference to the Class I-A

frequency 1160kc. From the foregoing, Petitioner has shown that its proposal fully complies with the criteria in the Commission's Further Report and Order (FCC 62-117) released February 5, 1962, and with

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Eckardt

Section 1.351 of its Rules.

THE COMMISSION'S REPORT AND ORDER OF MAY 10, 1962 IS ILLEGAL

6. Petitioner contends that the Commission cannot legally refuse to accept and process its application since it complies with the Communications Act, the Commission's allocation and interference Rules and actually provides for an improved allocation of the frequency 1140kc, and for an improvement in the coverage of its existing station without causing any co-channel or adjacent channel interference to any existing station, and receiving only a de minimus amount of adjacent channel interference from one existing station. Petitioner further contends that the Commission's Freeze Order of May 10, 1962 is legally ineffective and invalid.

7. The order amending Section 1.354 purports to be effective immediately, but Section 3 of the APA states that the agency "shall separately state and currently publish in the Federal Register . . . . statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available . . . . .No person shall in any manner be required to resort to organization or procedure not so published." The Commission's Report and Order was not published in the Federal Register until May 16, 1962, (27 F.R.4626) and, hence, its order, purporting to be effective on May 10, 1962 is defective on its face. Accordingly, the rule in any event is not effective until May 16, 1962.

8. Sections 154 (i) and 303 (r) of the Communications Act empowers the Commission to enact rules not inconsistent with the Act or Law. The touchstone of the Communications Act is the public convenience, interest and

necessity and it is charged with the responsibility of providing rules and regulations and application forms which will elicit the information it needs to determine whether applications filed with it will serve the many facets of the public interest. Scripp's-Howard Radio v. FCC, 316 U.S.4, 14. Petitioner does not challenge the Commission's right to adopt rules which are reasonably related to administration of the new and rapidly changing uses of the art of broadcasting. Accordingly, it may fashion rules with respect to the time related to a specific administrative problem when applications must be filed to receive consideration provided for by the Communications Act. Ranger (Radio Cabrillo) v. F.C.C., 21 RR 2030, 2034. But if there is no reasonable relation between the rule and the problem confronting the Commission, the courts have reversed the Commission. Even a reasonable rule unreasonably applied may impinge upon substantive rights and the courts have reversed the Commission. Ridge Radio Corp. v. FCC, 21 RR 2060, 2064.

The May 10, 1962 Report and Order and the footnote to Section 1.354 of the Commission's Rules is discriminatory, arbitrary and unfair in that it proposes to consider over 400 pending applications for new stations and over 400 applications for major changes in facilities of existing stations in non-docket cases and to hear and determine 154 applications for new stations and 53 applications for major changes in docket cases. Thus, almost 1100 applications will be acted upon by the Commission regardless of the inconsistency which a grant thereof will have upon the objectives and criteria it has purported to adopt in its May 10, 1962 Order.

Obviously, the grant of these 1100 applications on all classes of standard broadcast frequencies will completely ignore the May 10, 1962 criteria and grants

of such applications will undoubtedly frustrate the objectives of the Order and nullify the very reason for freezing the consideration of any new applications. Accordingly, the Commission is foreclosing the very benefits it purports to achieve by the May 10, 1962 freeze. For the foregoing reasons there is no reasonable relationships between the May 10, 1962 freeze including the amended Section 1.354 of the Commission's Rules and the Commission's statutory duties and responsibilities to administer the Act in the public's convenience, interest, and necessity.

9. Since the footnote to Section 1.354 of the Rules is not a reasonable restriction upon the consideration of applications for new or changed facilities, the Order is illegal. Section 308 and 309 of the Communications Act provide for a hearing on applications which supply all information required by the Communications Act, the Commission's Rules and the Commission's application form. The courts have held that such an application is entitled to be considered and that a denial without hearing is invalid. Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333. Moreover, the Commission cannot bind itself inflexibly to licensing policies expressed in the Regulations. It must still exercise an ultimate judgment whether the grant of applications furnishing all the required information will serve the public interest, convenience, and necessity. If time and changing circumstances reveal that the public interest will not be served by the application of Section 1.354, as amended by the May 10, 1962 Order, it must be assumed that the Commission will act in accordance with its statutory duty. National Broadcasting Co. v. United States, 319 U.S. 190, 225. Here, the

Commission is binding itself inflexibly to adhere to a freeze on consideration of new applications when the very substantial body

of pending applications it is acting upon will destroy the very purpose of the freeze. Thus, the substantive rights of the Petitioner are violated by the May 10, 1962 Order.

10. Moreover, Petitioner might expect the Commission to follow basic requirements of Notice which it has observed in the past. In 1947, the Commission gave notice on January 8, 1947 that it was adopting a Temporary Expediting Procedure applicable to applications filed a month later, on February 7, 1947. When the Television freeze of 1948-1952 was imposed on September 30, 1948, there had been a pending Rule Making Proceeding for several months prior thereto, (FCC 48-1569) in Dockets 8736 and 8975. And in that instance, new applications were not refused outright but were only placed in the pending file. In addition, all pending applications were considered on a case-to-case basis and Commission action depended upon whether they would or would not obfuscate the objectives that the freeze sought to correct. Likewise, in the current FM freeze of December 6, 1961 (FCC 61-447), there had been a pending Notice of Proposed Rule Making looking toward improvements in the FM Broadcast Rules (FCC 61-833). Here, unlike all prior Commission actions on overall allocation Rules, the Commission acted without Notice of any kind and without the slightest indication that it had any new policy in the formulative stage. This unusual action in the background of the most recent release of the frequency 1140kc for application and the outstanding Notice of a "cut off" date for applications which had reached the top of the processing line is most unfair to Petitioner and the Order thus is discriminatory and arbitrary as it affects his substantive rights.

For the foregoing reasons, the Commission should reconsider and

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Eckardt

rescind its May 10, 1962 Order and dissolve the freeze on new standard broadcast applications imposed by Section 1.354 of the Rules as amended by such Order. Petitioner requests a hearing and oral argument on the issues raised herein.

SECTION 1.354 AS AMENDED BY THE MAY 10, 1962 ORDER SHOULD BE WAIVED

11. If for any reason the Commission does not reconsider and vacate its May 10, 1962 Order, the footnote to Section 1.354 of the Rule should be waived so that Petitioner's application filed herewith, may be accepted for filing, processed and considered by the Commission. In support of his request for a waiver of said Rule, Petitioner adopts all of the facts and matters alleged in support of its request for reconsideration and recision of said Order.

Petitioner has spent substantial sums of money in good faith to prepare the instant application to improve the facilities of WCLW. The public interest will be served by a grant. The allocation structure will be improved without adversely affecting any other station and the service of WCLW will be expanded to new areas and new communities which presently have no local radio outlet. Petitioner has earnestly and diligently worked to prepare and file the instant application since the frequency was unfrozen in Docket 6741 and this is the very earliest date that he has been able to file it with the Commission. Accordingly, Petitioner requests that the Commission waive Section 1.354 of the Rules as amended by the May 10, 1962 Order and requests oral argument to present his entitlement to said waiver.

WHEREFORE, Petitioner respectfully requests that the Commission: 1) Reconsider and rescind its Report and Order of May 10, 1962 and

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Eckardt

Section 1.354 as amended by said Order; or 2) Reconsider the

effectiveness of such Order; or 3) Waive Section 1.354 of its Rules as amended by said Order and pursuant thereto accept for filing and processing his application tendered herewith; and 4) Grant Petitioner a hearing for the protection of his substantive rights.

Respectfully submitted,

Frederick C. Eckardt, d/b/a
Mansfield Broadcasting Company

By /s/ Robert F. Jones
Law Offices of Robert F. Jones
Its Attorney

June 15, 1962

[Certificate of Service]

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Eckardt

[Received June 15, 1962 - FCC]

PETITION FOR LEAVE TO FILE THE ATTACHED PETITION FOR RECONSIDERATION OF REPORT AND ORDER AMENDING SECTION 1.354 OF THE COMMISSION'S RULES TO POSTPONE THE EFFECTIVENESS OF SAID REPORT AND ORDER, FOR WAIVER OF SECTION 1.354 AS AMENDED BY SAID REPORT AND ORDER, AND FOR ACCEPTANCE OF APPLICATION FOR FILING

Frederick C. Eckardt, d/b/a/ Mansfield Broadcasting Company, licensee of radio station WCLW, Mansfield, Ohio, 1570kc, 1kw, DA-D, and above-captioned applicant for authority to change the operating frequency of said station to 1140kc, 1kw, DA-D, utilizing the presently authorized two tower antenna array of said station herewith requests leave to file the attached "Petition for Reconsideration of Report and Order Amending Section 1.354 of the Commission's Rules to Postpone the Effectiveness of said Report and Order, For Waiver of Section 1.354 as Amended by said Report and Order, and For Acceptance of Application for Filing." In support thereof, the following is shown:

1. Petitioner on February 7, 1962, promptly after the Commission released the frequencies including 1140kc which had been frozen pursuant to the Commission's action in Docket 6741, ordered his consulting engineer to prepare his application to change the operating frequency of radio station WCLW from 1570 kc to 1140kc. Said application is filed simultaneously with the Petition for Reconsideration of the Commission's May 10, 1962 Order which amended Section 1.354 of the Commission's Rules and imposed a freeze on the

acceptance of new applications.

2. The determination of site, available frequency, and antenna array required time to make a selection of the frequency and the pattern proposed in said application.

3. The Petitioner-applicant, his consulting engineer and his attorney proceeded with the greatest speed possible to finish preparation of said application.

4. This is the earliest possible date that the application tendered with the attached Petition for Reconsideration, Waiver and other Relief could be filed with the Commission.

5. The May 10, 1962 Order of the Commission was not published in the Federal Register until May 16, 1962, and the effective date is therefore June 16, 1962.

WHEREFORE, Petitioner herewith requests the Commission to accept the late filing of his said Petition for Reconsideration of Report and Order Amending Section 1.354 of the Commission's Rules to Postpone the Effectiveness of said Report and Order, For Waiver of Section 1.354 as Amended by said Report and Order, and For Acceptance of Application for Filing.

Respectfully submitted,

Frederick C. Eckardt, d/b/a
Mansfield Broadcasting Company

By /s/ Robert F. Jones

* * * *

June 15, 1962

[Certificate of Service]

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Eckardt

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

In reply refer to
8720

October 17, 1962

Frederick Eckard, tr/as
Mansfield Broadcasting Company
771 McPherson Street
Mansfield, Ohio

Re: Radio Station WCLW
Mansfield, Ohio

Gentlemen:

Returned herewith is your application tendered for filing June 15, 1962 to change frequency of Radio Station WCLW, Mansfield, Ohio.

Preliminary examination of your proposal indicates that the application is not consistent with the interim criteria contained in the "NOTE" to Section 1.354 of the Commission's Rules.

On October 10, 1962, the Commission denied various petitions requesting reconsideration or waiver of the interim criteria adopted by Report and Order of May 10, 1962. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962 is enclosed for your information.

Your application is returned without prejudice to its later resubmission when the interim criteria are no longer in effect, provided, of course, that the proposal would be consistent with the substantive rules in force at that time.

Very truly yours,

Ben F. Waple
Acting Secretary

* * *

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DuPage

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

In reply refer to:
8720

October 17, 1962

DuPage County Broadcasting, Inc.
c/o Mr. Frank Blatter
214 Main Street
Glen Ellyn, Illinois

Gentlemen:

Returned herewith is your application tendered for filing June 1, 1962 requesting a construction permit for a new standard broadcast station to serve Elmhurst, Illinois.

Preliminary examination of your proposal indicates that the application is not consistent with the interim criteria contained in the "NOTE" to Section 1.354 of the Commission's Rules.

On October 10, 1962, the Commission denied various petitions requesting reconsideration or waiver of the interim criteria adopted by Report and Order of May 10, 1962. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962 is enclosed for your information.

Your application is returned without prejudice to its later resubmission when the interim criteria are no longer in effect, provided, of course, that the proposal would be consistent with the substantive rules in force at that time.

Very truly yours,

Ben F. Waple
Acting Secretary

* * *

[Received June 8, 1962 - FCC]

PETITION FOR ACCEPTANCE OF APPLICATION FOR FILING, FOR WAIVER OF SECTION 1.354 AND/OR RECONSIDERATION OF ORDER AMENDING SAID SECTION, AND FOR OTHER RELIEF

Comes now GOOD MUSIC BROADCASTING COMPANY and requests the Commission to accept for filing and to process petitioner's application being filed with the Commission simultaneously with this petition, to that end granting such of the herein requested relief as may be appropriate or necessary. In support of this petition, Good Music shows the following:

I PRELIMINARY STATEMENT

1. Petitioner is the licensee of WKTX, Atlantic Beach, Florida, operating on the frequency of 1600 kc with power of 1 kw daytime only. The accompanying application seeks a construction permit for increase in power to 5 kw, daytime, at Atlantic Beach, Florida, and change of site. Petitioner has had under consideration its tendered application for many months, having taken field intensity measurements for this purpose as early as March 23, 1962. (See engineering statement of Herman E. Hurst, Jr. contained in engineering exhibits of application.)

2. It is petitioner's position that, assuming its application to be complete, the Commission cannot legally refuse to accept and process it, and in this connection petitioner believes that the purported "freeze" order of May 10, 1962, is legally ineffective and not valid. In such situation the instant petition should not be necessary. Since, however,

the Commission has not, as of this date, withdrawn the illegal and ineffective order, the petitioner requests that the order of May 10, 1962, amending Section 1.354, be reconsidered and upon reconsideration be vacated, or in any event that the referenced section of the rules be waived so that the concurrently filed application may be accepted and processed.

II JURISDICTIONAL STATEMENT

3. This petition is filed pursuant to Sections 308 and 309 and Section 405 of the Communications Act of 1934, as amended, pursuant to Section IV of the Administrative Procedure Act, and pursuant to Sections 1.11, 1.15 and 1.191 of the Commission's Rules implementing the several sections of the Communications Act and the Administrative Procedure Act. Petitioner is a party who has, concurrently herewith, filed with the Commission a complete and proper application for a permit to increase the power of radio station WKTX, which application the Commission threatens to deny without any consideration, and thus deny without a hearing. The denial and substantial deprivation of rights is threatened by the illegal and arbitrary Report and Order of May 10, 1962. Petitioner requests the Commission to reconsider and set aside the said illegal and arbitrary Order, or to waive the provisions of Section 1.354 of the rules which the Order would amend, and to retain and process the petitioner's application in accordance with the requirements of the Communications Act, the Administrative Procedure Act, and the established judicial precedents.

III THE MAY 10 FREEZE ORDER IS ILLEGAL

A. The Right To A Hearing

4. It is established beyond any troubling doubt that an applicant who timely submits a complete application, i.e., one containing the information required to be set forth by the Communications Act and the application form,

has a right to have its application considered, and no denial can validly be made without a hearing. Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 333. This is a substantive right which the Commission cannot derogate, either intentionally or by the demonstrable effect of an order. See Delta Air Lines, Inc. v. C.A.B., 275 F.2d 632, 637.

B. Substantive Rights, Not Merely Procedural Matters Are Involved

5. As the Supreme Court early opined, "Congress has granted applicants a right to a hearing on their applications for station licenses." Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 333. To be sure, the Commission may fashion procedural rules for the orderly administration of its business, and in that connection such rules may make reasonable restrictions with respect to the time when an application must be filed in order to obtain consideration guaranteed by the Communications Act. See Ranger (Radio Cabrillo) v. F.C.C., ___ F.2d ___, 21 R.R. 2030, 2034. But when the procedural rule is unreasonable or is unreasonably applied by the Commission so as to impinge substantive rights, the courts do not hesitate to reverse the Commission. Ridge Radio Corp. v. F.C.C., ___F.2d ___, 21 R.R. 2060.

6. The Report and Order of May 10, 1962, seeks to justify its failure to comply with the provisions of Section 4 of the Administrative Procedure Act on the ground that the amendments to Section 1.354 which bar any new applications in petitioner's class "relate to matters of practice and procedure before the Commission". 1/

1/ Since the Commission recites as the sole reason for avoiding Section 4 of the A.P.A. the ground that the rule change is one affecting practice and procedure we do not have involved the question of whether or not the matters set forth in the Report and Order are of an emergent public interest nature as might otherwise justify lack of compliance with the A.P.A. If the Commission would seek to assert such argument petitioner would be willing to meet it and demonstrate its lack of basis. However, the Commission cannot now offer any such argument because the Report and Order with which the instant petition is concerned does not set that forth as any reason therefor.

Good Music

If the Commission is in error, as petitioner submits it is, in viewing the May 10 Report and Order as simply affecting matters of practice and procedure when in fact matters of substantive rights are involved,

the Commission must withdraw the Report and Order and follow the express requirements of Section 4 of the Administrative Procedure Act. 5 U.S.C. Section 1003. The referenced provision of the A.P.A. requires that before any such rule as is involved in the May 10 Report and Order may become effective, the Commission must publish notice of proposed rule making in the Federal Register and afford opportunity to interested persons to participate in the proceeding through the submission of written data, views or arguments. Thereafter, the effective date of any rule adopted in the rule making proceeding shall not be effective prior to thirty days after the publication of the rule, except in exceptional situations.

7. The question of whether the May 10 Report and Order involves merely a matter of administrative convenience in processing applications or is actually an attempted amendment or modification of applicant's rights under the Communications Act and the Ashbacker doctrine must be answered by the plain English of the Report and Order and the effect thereof. It creates a new regulation and is thus a substantive or legislative rule to which the requirements of rule making and prior notice applies. Petitioner submits that a regulation which has a clear, plain and simple meaning, and a clear, plain and simple effect of barring its application from consideration, notwithstanding an extant notice to the contrary, changes the unmistakable meaning of the other regulation, as well as the unmistakable meaning of the Communications Act, Ashbacker, supra, and could not then be merely a matter relating to practice and procedure of the Commission. The right to be heard is the cornerstone of due process before the Commission. When by order the Commission attempts to foreclose that right on the asserted grounds that the foreclosure simply "relate(s) to matters of

practice and procedure before the Commission", the attempted change

in the well-established law is so obviously erroneous that the Commission should desire to reconsider it on its own motion.

8. At this juncture a word might be said about the so-called "freeze order" adopted on September 30, 1948, in the television allocation proceeding. The differences between it and the May 10 Report and Order are significant and certainly make the television freeze order distinguishable. In the first place, the television freeze order was issued in a rule making proceeding, some four months after such proceeding had been instituted. Here no rule making proceeding has been commenced, and there was no prior notice of a contemplated change in AM allocation standards. Secondly, the freeze order applied not only to prospective applications but to those then pending and not acted on.[2/] Again, the television freeze order did not bar the filing of applications, but provided that new applications would be placed in the pending file together with theretofore filed and pending applications. In this way the Ashbacker rights of the applicants and the interest of the several communities under Section 307(b) of the Act were protected. The instant order, however, would unfairly discriminate and prejudice both applicants and communities.

9. The Commission stated several places in the May 10 Report and Order that the barring of future applications is designed to permit final action on pending applications while the Commission gives some thought (but not in a legal rule making proceeding) to new assignment standards. Again referring to the 1948 freeze order in the television allocations case, if the Commission is contemplating some sort of an assignment table or some

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2/ "Applications pending before the Commission and those hereafter filed for permits to construct television stations on Channels 2 through 13 will not be acted upon by the Commission but will be placed in the pending file." FCC 48-2182 cited in Fifth Report, 1 R.R. 91:565.

new set of assignment standards for AM broadcasting a freeze order would have to be issued in a rule making proceeding, and, further, would have to apply to all applications and not just to some. The discriminatory aspect of the May 10 Report and Order in the unfair treatment ordered for some applicants and some communities as compared with other applicants and other communities, is no less than the absolute denial of established rights.

10. The statement of the Commission that it would complete processing of those applications currently on file and that "applications for standard broadcast facilities now pending will be processed and acted upon in normal course" supplies the key distinction between the May 10 Report and Order and the 1948 television freeze. Also, it illustrates very well the point which petitioner asserts, namely, that if indeed new assignment standards would be impinged by further grants the impingement would be no less from an application filed on April 9 or May 9, than one on May 11 or some later date. The May 10 date specified in the referenced Report and Order is simply an arbitrary date selected without regard to parties in petitioner's position who have been expending time, money and effort preparing an application in reliance on established Commission procedures.

11. Section 307(b) of the Act directs the Commission "to make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." The Commission would blunt the plain intent and purposes of Section 307(b) and foreclose from consideration without adequate notice applications such as petitioner's. In such situation the Commission cannot but admit that it is being unfair and prejudicially affecting substantive rights. If for no other reason than the proper implementation

of Section 307(b) the Commission must withdraw the May 10 Report and Order and the "barring" provisions of Section 1.354 adopted thereby.

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Good Music

IV THE NEW RULE SHOULD BE WAIVED

12. In the foregoing portion of this petition it was demonstrated that the Commission should reconsider the May 10 Report and Order and then vacate it because of the substantial errors present therein. However, if for any reason the Commission does not reconsider and vacate the order, then the new portion of Section 1.354 thereby enacted should be waived so that petitioner's application, filed concurrently herewith, may be accepted and brought on for consideration. The reasons for the waiver are found both in law and equity; they arise both from rights of petitioner and from rights of the public.

13. Operating primarily as a "good music" station WKTX has received a number of complaints from listeners that they are unable to satisfactorily receive WKTX. This prompted consideration of ways and means to satisfy this public demand for improved reception. It was concluded that an increase in power would be the best course to pursue in meeting this need. In order to avoid increased interference to co-channel and adjacent channel stations, it was found that the present site of WKTX, which is close to the ocean beach, would have to be moved inland in order to escape the effects of the superior conductivity of sea water along the coast. Additionally, in doing this it was found that interference might be caused to WNGA, Nashville, Georgia, a co-channel station. Accordingly, in March, 1962, field intensity measurements were taken which established that no such interference would be created. The decision was then made to proceed with the application and steps were taken to secure an appropriate site which would meet the requirements of the Commission and serve the purposes intended.

14. Before petitioner could complete the application the Commission announced its immediately effective Report and Order of May 10, 1962. By this time petitioner had expended considerable money in taking field intensity measurements and otherwise making preliminary arrangements for the intended application.

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Good Music

15. As shown by the engineering statement accompanying the application, the proposal of WKTX will not cause or increase interference to any existing station but in fact would reduce the interference to WELE, Daytona Beach, Florida, an adjacent channel station. Nor would there be a conflict with any pending application. If petitioner's application were granted, WKTX would be able to increase the population served from 235,524 people to 471,647 people, an increase of over 100%. Additionally, people living within the present service area of the station would receive a substantially improved signal, which would go far to satisfy the demands now being made upon the station by the public.

16. It has been shown that: 1) petitioner's application will meet the demands of listeners in the area for a better signal from WKTX; 2) petitioner has expended considerable money and effort to prepare the application prior to the May 10, 1962, Report and Order; 3) the application, if granted, will not create any new interference but will in fact reduce interference to existing radio facilities; and 4) the grant of petitioner's application would permit it to more than double the number of persons now served. To arbitrarily deny these improvements and cause petitioner to waste the time and money expended prior to the May 10 Report and Order is an abdication by the Commission to carry out its statutory responsibilities under the Communications Act of 1934, as amended. Moreover, whatever the Commission might eventually do, pursuant to the May 10 Report and Order, would not

be complicated, or obstructed, by permitting an existing station, such as here, to go up in power on its presently assigned frequency.

17. However, if the May 10 Report and Order, and the amendments to Section 1.354 which the order accomplishes, are not waived the community stands to lose the opportunity for improved service. Too, petitioner's substantial efforts and its investment of time and money will be for naught. How can the Commission seriously contend that the public interest

is the standard of measure for all its actions without giving serious consideration to the aforementioned factors? Petitioner submits that the Commission must, consonant with its statutory responsibilities, consider those matters and then waive the amended Section 1.354 and accept and process in due course petitioner's referenced application.

V CONCLUSION

18. In view of the foregoing, it is respectfully submitted that the rule change made by the May 10 Report and Order must be withdrawn and the Report and Order vacated. First, adequacy of prior notice is a basic component of proper administration, and there was no prior notice of the substantial changes of May 10. Secondly, viewing the effect of the rule change against established law permits of no conclusion but that the new rule is a legislative one, affecting substantive rights and accomplishing important departures from the intendment of the Communications Act itself. Ashbacker Radio, supra. The examination of the new rule shows clearly that the May 10 action was not merely concerned with matters of practice and procedure, but in fact deals with substantive matters. The clear failure of the Commission to follow the procedures required by Section 4 of the Administrative Procedure Act, before adopting the rule, makes the May 10 action void.

19. Beyond the serious legal deficiencies of the new rule, the Commission should not seek to assert the bar of the rule to preclude itself from accepting and considering petitioner's application. Equity and fairness to the public, no less than to petitioner, require that the provisions of the rule be waived so that petitioner's application may be accepted and processed. Fairness to communities is the touchstone of the Communications Act, F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358, and the Commission should acknowledge this principle by waiving new Section 1.354 even if said new provision had been lawfully enacted (and it has not).

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Good Music

WHEREFORE, the premises considered, the petitioner requests that:

(a) The Commission reconsider, and upon reconsideration vacate and set aside, the illegal and arbitrary Report and Order of May 10, 1962, and the new provisions of Section 1.354 enacted thereby;

(b) Accept for filing and processing in normal course petitioner's application filed concurrently herewith, waiving, if necessary to that end, the provisions of Section 1.354 as enacted on May 10, 1962; and

(c) Grant unto the petitioner such other further relief as the nature of its request and the protection of its rights may require.

Respectfully submitted,

GOOD MUSIC BROADCASTING COMPANY

BY: MILLER & SCHROEDER
Its Attorneys

/s/ Arthur H. Schroeder

/s/ John B. Kenkel

/s/ John P. Bankson, Jr.

218 Munsey Building
Washington 4, D. C.

June 8, 1962

[Certificate of Service]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

In reply refer to:
8720

October 17, 1962

Good Music Broadcasting Company
Radio Station WKTX
c/o Mr. Robert C. Whitehead, Jr.
709 Barnett National Bank Bldg.
Jacksonville, Florida

Gentlemen:

Returned herewith is your application tendered for filing June 8, 1962 for a change in the facilities of Radio WKTX, Atlantic Beach, Florida.

Preliminary examination of your proposal indicates that the application is not consistent with the interim criteria contained in the "NOTE" to Section 1.354 of the Commission's Rules.

On October 10, 1962, the Commission denied various petitions requesting reconsideration or waiver of the interim criteria adopted by Report and Order of May 10, 1962. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962 is enclosed for your information.

Your application is returned without prejudice to its later resubmission when the interim criteria are no longer in effect, provided, of course, that the proposal would be consistent with the substantive rules in force at that time.

Very truly yours,

Ben F. Waple
Acting Secretary

* * *

BRIEF FOR APPELLANT-PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

390

No. 17,415

DUPAGE COUNTY BROADCASTING INC.,
Elmhurst, Illinois,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

No. 17,479

DUPAGE COUNTY BROADCASTING INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

Appeal from and Petition for Judicial Review of
Orders and Actions of the Federal Communications Commission

LAUREN A. COLBY
945 Pennsylvania Avenue, N. W.
Washington 4, D. C.

Attorney for Appellant-Petitioner
DuPage County Broadcasting Inc.,
Elmhurst, Illinois.

STATEMENT OF QUESTIONS PRESENTED[1]

1. Does the Federal Communications Commission "freeze" rule set forth in a "Note" following 47 C.F.R. 1.354 constitute a substantive rather than a procedural rule change, and if so, was the Commission required to give notice and/or follow the public rule making procedure prescribed by Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003?

2. Did the Commission act arbitrarily and capriciously, and did it deprive appellant[2] of due process of law, when, without a hearing as provided in Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, it returned appellant's application?

3. Does the Commission's "freeze" rule violate the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), that broadcasting is to be left in the area of free competition?

4. Did the Commission's failure to give any advance notice of the "freeze" constitute arbitrary and capricious action which deprived appellant of due process of law?

5. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

6. Was there a reasonable relationship between the Commission's imposition of the "freeze" and its resultant return of appellant's applications on the one hand, and the rule-making announced in the Commission's Report and Order of May 10, 1962, on the other hand?

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[1] See prehearing stipulation of February 5, 1963.

[2] "Appellant", as used herein and elsewhere in this brief, refers to Robert A. Jones, et al., in his character of petitioner as well as appellant.

INDEX

COURT CASES

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*Cases chiefly relied upon are marked by asterisks.

STATUTES

OTHER AUTHORITIES

United States Court of Appeals

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No. 17,415

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FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

Appeal from and Petition for Judicial Review of
Orders and Actions of the Federal Communications Commission

BRIEF FOR APPELLANT-PETTTIONER

JURISDICTIONAL STATEMENT

The Petition for Review and Notice of Appeal in these consolidated cases are directed against the action of the Federal Communications Commission, taken October 17, 1962, ordering the return of the application of

DuPage County Broadcasting Inc., for a construction permit for a new standard broadcast station at Elmhurst, Illinois, and the Memorandum Opinion and Order of the Federal Communications Commission (Commissioner Hyde dissenting and Commissioner Henry not participating), dated October 10, 1962 (R. 1-5), referred to in the Commission's letter returning said application.

Jurisdiction to hear the appeal is conferred upon this Court by Section 402(b) and (c) of the Communications Act of 1934, as amended [66 Stat. 718, 47 U.S.C. 402(b) and (c)]. Jurisdiction to hear the Petition for Review is conferred by the Judicial Review Act of 1950 [Act of December 29, 1950, c. 1189, 64 Stat. 1129, 5 U.S.C. 1032-1034, 1039], as amended; Section 402(a) of the Communications Act of 1934, as amended; [48 Stat. 1093, 47 U.S.C. 402(a)]; and Section 10(a) of the Administrative Procedure Act [60 Stat. 243, 5 U.S.C. 1009(a)]. Venue in this Court is provided by Section 3 of the Judicial Review Act [64 Stat. 1130; 5 U.S.C. 1033].

STATEMENT OF THE CASE

Elmhurst, Illinois, is a community of 36,991 persons, located in DuPage County, Illinois, (population: 313,459). There is no standard radio station located anywhere in the entire county.

Mr. Frank Blatter, a resident of the Elmhurst area for many years, has spent most of his life in the field of radio broadcasting, having served as a script writer, manager of an all-girls' orchestra, director of the WLS National Barn Dance radio program, and in other capacities. For a long time, Mr. Blatter has wished to possess an ownership interest in a radio station, and as early as 1947, he formulated plans and drew up a detailed program proposal for a station in the general vicinity of Elmhurst. Initially, lack of capital made it impossible to proceed. However, Mr. Blatter persevered in his intention to establish a station, and finally, in 1961, he retained engineering counsel and located a frequency

(1530 Kc) upon which an application might be filed. Further, in August, 1961, Mr. Blatter contacted legal counsel. And Mr. Blatter enlisted the support of responsible businessmen associates, who formed a corporation to apply for a construction permit, namely, DuPage County Broadcasting, Inc.

All the necessary arrangements having been made with legal and engineering counsel, an application could readily have been filed as early as January, 1962, or — if it had been absolutely necessary to do so — even earlier. The Appellant was, however, engaged in lengthy negotiations with the Illinois Highway Commission, looking towards the optioning of a plot of land for use as a transmitter site for the proposed station. While the Appellant felt reasonably certain that these negotiations would be ultimately successful, it naturally did not wish to file its application with engineering prepared for one site, if there was any possibility that the application might later have to be amended to specify a different site. Accordingly, there being no apparent reason for undue haste, Appellant temporarily suspended the preparation of its application until approximately May 3 or May 4, 1962, when Appellant at last learned that the Illinois Highway Commission had approved its proposal to purchase the Commission's land, for a radio station.

Upon receipt of Highway Commission approval of the site, Appellant instructed its engineer and attorney to proceed to finalize its application to the FCC. On May 10, 1962, however, before the application was completed and filed, the FCC, abruptly and without advance notice issued a Report and Order, announcing that from that date forward — with trifling exceptions — it would accept no more applications for new standard broadcast stations. By its terms, the Order (known herein as the "freeze" order) purported to bar the acceptance of such applications as the DuPage County application. However, because Appellant believed that the Commission had no legal right to apply a "freeze" to its application, Appellant proceeded to finalize its proposal and to file it —

notwithstanding the freeze. The application was filed with the Commission on June 1, 1961. It was detailed and complete, consisting of some 74 pages of data, reflecting the lengthy and extensive preparation which had taken place. Moreover, when the Appellant later received additional information bearing on its application, it twice amended the application to submit such information.

On October 17, 1962, the Commission sent the Appellant a letter, announcing that it was physically returning the DuPage County application to Appellant, because such application was inconsistent with the "freeze". Appellant hereby seeks review of the Commission's action returning its application, and Appellant seeks review of the Memorandum Opinion and Order of the Commission referred to in its October 17, 1962, letter.

STATUTES AND RULES

The applicable sections of the Communications Act, the Administrative Procedure Act, the Federal Register Act and the Commission's Rules, are set forth in the Appendix to this Brief.

STATEMENT OF POINTS

1. The Commission's "freeze" Order of May 10, 1962, was unlawful and invalid, since — without a hearing and with no advance notice — it purported to arbitrarily and capriciously cut-off Appellant's right to file an application for a new standard broadcast station at Elmhurst, Illinois, even though said application was in full conformity with, and had been prepared in reliance upon, the Commission's Rules.

2. The Commission's "freeze" Order of May 10, 1962 (R. 1-5), was unlawful and invalid, since it constituted an attempt to accomplish a substantive rule change without first initiating and carrying out rule-making proceedings, as required by law, (specifically Section 4 of the

Administrative Procedure Act (60 Stat. 238, 5 U.S.C. § 1003) and Section 1.211 of the Commission's Own Rules (47 C.F.R. 1.211)).

3. The Commission's actions arbitrarily and capriciously denied Appellant's application without the hearing to which Appellant is entitled by reason of the provisions of Section 309 of the Communications Act.

4. The Commission's freeze on the acceptance and processing of applications filed after May 10, 1962, is invalid, because it affords protection from competition to existing stations and to applications filed on or before May 10, 1962, in violation of the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), that broadcasting should be left in the area of free competition.

SUMMARY OF ARGUMENT

The freeze is basically arbitrary and capricious and contrary to law for a number of separate, distinct and independent reasons — any one of which requires a finding for Appellant in this proceeding. Because the freeze was adopted without any advance notice, it violates the most basic and elementary requirement of procedural due process. Because the freeze affords protection from competition to existing stations and to applications filed on or prior to May 10, 1962, it is contrary to the doctrine clearly ennunciated by the Supreme Court in the Sanders Radio case (supra) that the Communications Act requires broadcasting to be left in the area of free competition — and not afforded the protection from competition which is given to common carriers. Further, although the FCC has sought to defend its treatment of the freeze on the grounds that it was a procedural action, and not a substantive action requiring rule making, the fact that no notice or opportunity was given to the public to comply with the newly enacted freeze requirements, and the far reaching impact of the requirements themselves belie the contention that the freeze is merely a procedural device. On the contrary, it is a substantive action,

which could not be lawfully adopted without rule making proceedings, and could not be made effective without reasonable notice. Finally, the Commission's actions returning Appellant's application and the applications of the other appellants in this consolidated proceeding were unlawful, because they contravened the requirement of Section 309(e) of the Communications Act that no application shall be denied without a hearing.

ARGUMENT

I. THE FREEZE MUST FAIL FOR LACK OF NOTICE

Action with respect to an application for a construction permit is judicial in character. Sec. 2(d)(e) Administrative Procedure Act, (60 Stat. 237, 5 U.S.C. §1001(d)(e)). And when an administrative body acts judicially, timely and adequate notice are indispensable to due process. (Magnolia Petroleum Company v. Carter Oil Company, (10 Cir., 1955) 218 F.2d 1, 6, Cert. den. 349 U.S. 916 (1955); Parker v. Lester (9 Cir., 1955), 227 F.2d 708, 716; Detrio v. United States, (5 Cir., 1959), 264 F.2d 658, 662; Unity School of Christianity v. Federal Radio Commission (D.C. Cir., 1933), 62 U.S. App. D.C. 52, 64 F.2d 550).

This Court need go no further to decide this case. Notice is an indispensable ingredient of procedural process and here, the Commission purports to impose a freeze on the acceptance and processing of virtually all types of applications for an entire class of broadcast station, without any advance notice whatsoever. Appellant, and others similarly situated, had expended large sums of money, and much time and effort in the preparation of applications, in reliance upon the Commission's existing rules, which expressly allowed such applications to be filed, accepted, processed and granted. It was arbitrary and capricious for the Commission to attempt to change those rules—and thereby deprive the Appellant and others of all of the work, time, and expense

invested in their proposals, without giving some reasonable advance warning.

In Ridge Radio Corporation v. Federal Communications Commission, 110 U.S. App. D.C. 277, 292 F.2d 770 (D.C. Cir., 1961), this Court emphasized that adequate notice is a prerequisite to the validity of procedures limiting the right to file standard broadcast applications. In commenting upon the "cut-off" procedure (described in Appellant's Statement of the Case), this Court has said,

> "...when a particular cut-off date is fixed by public notice, a potential applicant is entitled to rely on the terms of the notice."
>
> Ridge Radio Corporation v. Federal Communications Commission, supra, at p. 773.

Under the Commission's Rules, in effect on the day when the freeze order was adopted, there was no limit on the time in which to file applications, except that if such applications involved a conflict with some other application, they had to be on file by the cut-off date of that other application, published in the Federal Register.[1] Appellant's application, however, was not in conflict with any other application. Hence, no limiting "cut off" date had been established, and Appellant was therefore on constructive notice that it might file its application at any time it wished.

Having established regularized procedures for the publication of "cut-off dates" and deadlines, the Commission was bound to follow those procedures. Service v. Dulles, 354 U.S. 363, 372 (1957); U.S. v. Shaughnessey, 347 U.S. 260, 266-267 (1954). Just as a state legislature cannot shorten the statute of limitations on negligence, contract or the like without giving reasonable advance warning to those who are relying on the old statute,[2] so the Commission could not,

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[1] Cf., Sections 1.354 and 1.361 of the Rules, reprinted in the Appendix to this brief.

[2] McCloskey & Co. v. Eckart (5th Cir., 1947), 164 F.2d 257; U.S. v. Morena, 245 U.S. 392 (1918); 34 Am.Jur., Limitation of Actions, §28.

consistent with the requirements of due process, change its established procedures and place a limit on the time in which to file Appellant's application without first giving some reasonable notice.

II. THE FREEZE IS GENERALLY ARBITRARY AND CAPRICIOUS

The Commission, however, did not give reasonable notice. Nor did it act reasonably. Although the freeze order refers to a partial halt in the acceptance and processing of AM applications, the interim criteria adopted by the Commission are so stringent as to bar virtually all applications for new AM stations – a fact evidenced by the Commission's own statistics which show that during the 10 months since the freeze was imposed, a total of only 4 such applications have been filed and accepted, in accordance with the "interim criteria". The interim criteria themselves are arbitrary and whimsical. Take, for example, the requirement that an applicant for a new station must serve 25% "white" area. In a remote section of Maine, where the total population served by a station may be only 10,000 people or less, 25% of the total may be 2,500 people. Consequently, an applicant serving 2,500 people in a white area in Maine can get his proposal accepted for filing. In New York state, on the other hand where the population is denser, a radio station may serve, say, 100,000 people. In that situation, if an applicant comes to the Commission and proposes to serve 20,000 people in a white area, his application will be rejected, because 20,000 persons does not comprise 25% of the population to be served. Yet by what right can the Commission contend that needs of 20,000 people in New York for a first radio service must be ignored, while the needs of 2,500 people in Maine are held to be so important as to require acceptance of an application to serve those people?

III. THE FREEZE IS CONTRARY TO THE SANDERS DOCTRINE THAT BROADCASTING MUST BE LEFT OPEN TO FREE COMPETITION

No less an authority than the United States Supreme Court has held that in enacting the Communications Act, Congress intended to

leave Broadcasting open to free competition, and not to provide for the broadcasting industry the type of economic protectionism associated with common carrier regulation. In the landmark case of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), the Supreme Court said as follows:

> "Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads [citations omitted] in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures. . . . [supra, at p. 474]."

By affording protection from competition to existing stations and to applicants whose applications were filed on or before May 10, 1962, the freeze runs directly counter to the Supreme Court's construction of the intent of Congress.

True, the Commission's freeze order does not speak of economic considerations. It is a fact, however, that at least one Commissioner, E. William Henry, recently publicly stated that the freeze is justified because of the allegedly depressed economic condition of the AM broadcasting industry.[3] Moreover, the May 14, 1962 issue of Broadcasting Magazine reported that on April 25, 1962 — approximately two weeks prior to the imposition of the freeze, a three-man delegation from the National Association of Broadcasters (an organization of existing radio stations headed by Leroy Collins, former Governor of Florida) met privately with the FCC Chairman Newton Minow, to discuss alleged "overpopulation" or excessive number of radio stations in the United States. Thus, the milieu from which the freeze sprang cannot be divorced entirely from economics.

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[3] Mr. Henry made his statement in a speech to the Federal Communications Bar Association, delivered on December 13, 1962.

But regardless of the sources of the Commission's actions, they are in any event violative of the Sanders doctrine because — irrespective of intent — they close the broadcasting industry to new competition, and deny to new applicants such as Appellant the right to enter the broadcasting field and compete on equal terms, either with existing stations or with those preferred applicants whose proposals — by purely fortuitous circumstance — happened to be filed on or before May 10, 1962.

IV. THE FREEZE IS INVALID BECAUSE THE COMMISSION FAILED TO COMPLY WITH THE RULE-MAKING PROCEDURES REQUIRED BY LAW AND BY THE COMMISSION'S OWN RULES

Additionally, the freeze must be struck down because the Commission failed to hold the rule making proceedings which, under Section 4 of the Administrative Procedure Act and Section 1.211(a) of the Commission's own Rules, are essential pre-requisites to the enactment of new substantive rules. The Commission's contention that the freeze is a "procedural" and not a "substantive" action, is lacking in merit. The term "procedure" refers to a method or manner of doing something.[4] Thus, a procedural change is a change in the manner or method whereby something must be done. For example, if the Commission should adopt a rule requiring all future applications to be filed on green paper, it would be a procedural rule, because it would change the method or manner in which applications are to be filed, in the future.

We do not understand, however, how a rule prohibiting the filing of any more applications can be considered "procedural". It does not change the method or manner in which applications are to be filed. Rather, it simply tells applicants that they may not file at all (unless

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[4] Webster's New Collegiate Dictionary, 1961 Edition, page 672, defines "procedure" as "a manner or method of proceeding in a process or course of action."

they meet certain virtually impossible conditions — conditions which are themselves clearly substantive and not procedural in nature).

Section 4(a) of the Administrative Procedure Act provides, in substance, that no substantive rule may be enacted without rule making proceedings, unless the "agency, for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."[5] No good cause existed, however, for any exceptions to the requirement of rule making in this case. The Commission's apprehension, expressed in its October 10 Memorandum Opinion and Order (R. 24-43) that reasonable notice and compliance with the APA might have led to a "flood of several hundred hastily prepared applications" is no justification for the Commission's actions in this case. If the Commission received applications which were incomplete or otherwise not in compliance with its requirements for acceptance for filing, it was under no obligation to accept such applications, and had a perfect right to return them to the applicants. Clearly, the Commission's apprehension was directed merely to the possibility that its workload might be increased by the necessity of considering a number of additional applications. But to dispense with required rule making proceedings for reasons of workload is to subordinate the merits of individual cases to the dictates of mere administrative expediency — something which obviously cannot be condoned.

To sum up, Appellant agrees with Commissioner Hyde, who specifically dissented from the freeze order because, as he observed in his dissenting statement, the freeze was "essentially a substantive policy decision and ought to be the subject of a public notice before decision". If the Commission had complied with Section 4 of the Administrative Procedure Act and Section 1.219(a) of its own Rules, Appellant would have had an opportunity to participate in the rule making

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[5] Similar provisions are found in Section 1.211 of the Commission's own Rules.

proceeding and even if the proceeding had terminated in a decision to impose a freeze, Appellant would still have had plenty of time in which to file its application, since the freeze could not have become effective until at least 30 days after the termination of the proceeding.[6]

V. THE RETURN OF APPELLANT'S APPLICATION WAS CONTRARY TO SECTION 309(e) OF THE COMMUNICATIONS ACT, WHICH PROVIDES THAT NO APPLICATION MAY BE DENIED WITHOUT HEARING

Finally, the Commission's action, returning Appellant's timely filed application without hearing was directly contrary to the clear requirements of Section 309 of the Communications Act. Section 309(a) specifically provides that:

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed, with it to which section 308 of this title applies, whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application, and upon consideration of such other matters as the Commission may officially notice, shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

But what about applications as to which the Commission cannot make the findings pre-requisite to a grant? With respect to these latter applications, Section 309(e) provides as follows:

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[6] Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003(c) provides, in pertinent part:

> "The required publication or service of any substantive rule (other than one granting or recognizing exemptions or relieving restriction or interpretative rules and statement of policy) shall be made not less than thirty days prior to the effective date thereof. . . ."

Section 1.219(a) of the Commission's Rules provides, moreover, that

> "Any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register except as otherwise specified in paragraphs (b) and (c) of this section."

> "If, in the case of any application to which subsection (a) of this Section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally."

Thus, when confronted with a proper application, the Commission has two choices: either grant it or designate it for hearing. In this case, the Commission did neither. Instead, it returned Appellant's application without a hearing and, accordingly, its actions must be reversed.

CONCLUSION

For the foregoing reasons, the freeze order, and the Commission's Memorandum Opinion and Order of October 10, 1962, and letter to DuPage County Broadcasting, Inc., of October 17, 1962 should be set aside; and these proceedings should be remanded to the Commission with instructions to accept Appellant's application for filing and processing, effective as of June 1, 1962.

Respectfully submitted,

LAUREN A. COLBY

945 Pennsylvania Avenue, N.W.
Washington 4, D.C.

Attorney for Appellant-Petitioner
DuPage County Broadcasting Inc.,
Elmhurst, Illinois.

APPENDIX

Administrative Procedure Act, Section 2

Order and Adjudication

(d) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

License and Licensing

(e) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Administrative Procedure Act, Section 4

Rule Making

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts —.

Notice; publication and contents

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Procedures

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any

manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of section 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

Time of publication or service of rules

(c) The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

Petitions

(d) Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. June 11, 1946, c. 324, § 4, 60 Stat. 238.

Rules of the Federal Communications Commission

§ 1.211 Notice of proposed rule making. — (a) When pursuant to petition therefor, or upon its own motion, the Commission proposes to issue, amend or repeal a substantive rule, a notice of proposed rule making will be published in the Federal Register unless all persons subject thereto are named and either are personally served or otherwise have actual notice thereof in accordance with law. Except when notice is required by statute or when the Commission considers it desirable, a notice will not ordinarily be issued of the adoption, amendment or repeal of interpretative rules, general statements of policy, organization rules, procedures or practice; matters relating to military, naval or foreign affairs functions of the United States, Commission management or personnel, public property, loans, grants, benefits or contracts; or in any situation in which the Commission for good cause finds (and incorporates such finding in the rule issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.

§ 1.219 Effective date of rules. — (a) Any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register except as otherwise specified in paragraphs (b) and (c) of this section.

(b) For good cause found and published with the rule, any rule issued by the Commission may be made effective within less than 30 days from the time it is published in the Federal Register. Rules involving any military, naval or foreign affairs function of the United States; matters relating to agency management or personnel, public property, loans, grants, benefits or contracts; rules granting or recognizing exemption or relieving restriction; or organization rules, procedure or practice, or interpretative rules and statements of policy may be made effective without regard to the 30-day requirement.

(c) * * * [Relates to Common Carriers only]

§ 1.354 Processing of standard broadcast applications. — (a) Applications for standard broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations (except applications for new Class II-A stations) or for major changes in the facilities of authorized stations, i.e., any change in frequency, power, hours of operation, or station location: Provided, however, that the Commission may, within 15 days after the tender for filing of any application for other modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of § 1.359.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(3) The third group consists of applications for new Class II-A stations.

(b) If an application is amended so as to effect a major change as defined in paragraph (a)(1) of this section or so as to result in a transfer of control or assignment which, in the case of an authorized station, would require the filing of an application therefor on FCC Form 314 or 315 (see § 1.329), § 1.359 will apply to such amended application.

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first.

Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

(d) Applications for new Class II-A stations are placed at the head of the processing line and processed as quickly as possible. Action on such applications may be at any time: (1) more than 30 days after public notice is given of acceptance of the application for filing, or (2) after January 30, 1962, whichever is later.

(e) The processing and consideration of applications for new stations or major changes on those frequencies specified in § 1.351 are subject to certain restrictions, as set forth therein.

(f) Applications other than those for new stations or for major changes in the facilities of authorized stations are not placed on the processing line but are processed as nearly as possible in the order in which they are filed.

(g) Applications for modification of license to change hours of operation of a Class IV station, to decrease hours of operation of any other class of station, or to change station location involving no change in transmitter site will be considered without reference to the processing line.

(h) If, upon examination, the Commission finds that the public interest, convenience and necessity will be served by the granting of an application, the same will be granted. If, on the other hand, the Commission is unable to make such a finding and it appears that a hearing may be required, the procedure set forth in § 1.362 will be followed.

(i) When an application which has been designated for hearing has been removed from the hearing docket, the application will be returned to its proper position (as determined by the file number) in the processing line. Whether or not a new file number will be assigned will be determined pursuant to paragraph (j) of this section after the application has been removed from the hearing docket.

(j)(1) A new file number will be assigned to an application for a new station, or for major changes in the facilities of authorized stations, when it is amended to change frequency, to increase power, to increase hours of operation, or to change station location. Any other amendment modifying the engineering proposal, except an amendment respecting the type of equipment specified, will also result in the assignment of a new file number unless such amendment is accompanied by a complete engineering study showing that the amendment would not involve new or increased interference problems with existing stations or other applications pending at the time the amendment is filed. If, after submission and acceptance of such an engineering amendment, subsequent examination indicates new or increased interference problems with either existing stations or other applications pending at the time the amendment was received in the Commission, the application will then be assigned a new file number and placed in the processing line according to the numerical sequence of the new file number.

(2) A new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50 per cent or more ownership interest in the amended application.

(3) An application for changes in the facility of an existing station will continue to carry the same file number although an assignment of license or transfer of control of said licensee (permittee) — applicant has been consented to by the Commission, provided the application for changes in facility (FCC Form 301) is amended jointly by the assignor and assignee or transferor and transferee, upon consummation of the assignment or transfer, to reflect the ownership changes and to include the financial and programming proposals of the new licensee (permittee) — applicant.

(k) When an application is reached for processing, and it is necessary to address a letter to the applicant asking further information, the application will not be processed until the information requested is received, and the application will be placed in the pending file to await the applicant's response.

(l) When an application is placed in the pending file, the applicant will be notified of the reason for such action.

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in § 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

Action on Applications

§1.361 Grants without hearing of authorizations other than licenses pursuant to construction permit; procedure for filing informal objections. — **(a)** Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to the grant. Such objections shall be signed by the objector. The limitation on pleadings and time for filing pleadings provided for in §1.13 shall not be applicable to any objections duly filed under this section.

(b) If the Commission finds, in the case of any application for an instrument of authorization other than a license pursuant to a construction permit, on the basis of the application, the pleadings filed, or other matters which it may officially notice, that the application meets the following requirements and presents no substantial and material question of fact, it will make the grant if:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (c) of this section;

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of provisions of law or this chapter or established policies of the Commission; and

(4) A grant of the application would otherwise serve the public interest, convenience, and necessity.

(c) In making its determinations pursuant to the provisions of paragraph (b) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

NOTE: Paragraph (c)(2) of this section applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also §§1.106(b)(1) and 1.354(c) and (h).

(d) If a petition to deny the application has been filed in accordance with §1.359 and the Commission makes the grant in accordance with paragraph (b) of this section, the Commission will deny the petition and issue a concise statement setting forth the reasons for denial and disposing of all substantial issues raised by the petition.

BRIEF FOR APPELLANT AND PETITIONER, FREDERICK ECKARDT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Case No. 17,421

FREDERICK ECKARDT,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

Case No. 17,483

FREDERICK ECKARDT,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES,
Respondents.

Appeal From and Petition for Review of Actions of the Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED

As set out in the prehearing stipulation of the parties, the questions presented in this case are:

1. Does the Federal Communications Commission's "freeze" rule set forth in a "Note" following 47 CFR 1.354 constitute a substantive rather than a procedural rule change, and if so, was the Commission required to give notice and/or follow the public rule making procedure prescribed by Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003?

2. Did the Commission act arbitrarily and capriciously, and did it deprive each appellant of due process of law, when, without a hearing as provided in Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, it returned each appellant's application?

3. Does the Commission's "freeze" rule violate the doctrine of *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, that broadcasting is to be left in the area of free competition?

4. Did the Commission's failure to give any advance notice of the "freeze" constitute arbitrary and capricious action which deprived each appellant of due process of law?

5. Was the Commission's refusal to consider each appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

6. Was there a reasonable relationship between the Commission's imposition of the "freeze" and its resultant return of appellants' applications, on the one

hand, and the rule making announced in the Commission's Report and Order of May 10, 1962, on the other hand?

7. With respect to Case Nos. 17,421 and 17,483 was the Commission arbitrary and capricious in refusing to accept appellant's application and in denying appellant's request for waiver in light of appellant's assertions that this application complied with all of the Commission's substantive rules, that it provided for an improved utilization of the frequencies involved, and that it would not preclude achievement of the Commission's objectives in the rule making proceedings announced in the Report and Order of May 10, 1962?

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Table of Authorities

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 17,421

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v.

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Case No. 17,483

FREDERICK ECKARDT,
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FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES,
Respondents.

Appeal From and Petition for Review of Actions of the Federal Communications Commission

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BRIEF FOR APPELLANT AND PETITIONER, FREDERICK ECKARDT

JURISDICTIONAL STATEMENT

This is an appeal and petition for review from a Memorandum Opinion and Order of the Federal Com-

munications Commission, adopted October 10, 1962, (R. 26-45) denying appellant's Petition for Reconsideration of Report and Order of May 10, 1962, for a Waiver of Section 1.354 of the Rules as amended by said Order and for Acceptance for filing of appellant's application for construction permit to improve the existing facilities of standard broadcast station WCLW, Mansfield, Ohio by changing its frequency from 1570kc, 1KW, directional antenna, daytime only to 1140kc, 1KW directional antenna, daytime only, and in which the Commission ordered the return of said application, without hearing. Jurisdiction to hear the appeal is conferred upon this Court by Section 402 (b) and (c) of the Communication Act of 1934, as amended [66 Stat. 718, 47 U.S.C. 402 (b) and (c)]. Jurisdiction to hear the petition to review is conferred by the Judicial Review Act of 1950 [Act of December 29, 1950, c.1189, 64 Stat. 1129, 5 U.S.C. 1032-1034, 1039], as amended; Section 402 (a) of the Communications Act of 1934, as amended [48 Stat. 1093, 47 U.S.C. 402 (a)]; and the Administrative Procedures Act [60 Stat. 243, 5 U.S.C. 1009 (a)]. Venue in this Court is provided by Section 3 of the Judicial Review Act [64 Stat. 1130; 5 U.S.C. 1033].

STATEMENT OF THE CASE

The Freeze Order

This case involves the question of the validity of the Commission's so called "freeze" order and, assuming such validity, whether the Commission was arbitrary and capricious in refusing to waive the "freeze" order so as to accept for filing the application of appellant for construction permit to improve its facilities at Mansfield, Ohio.

The freeze order was adopted in a Report and Order (FCC 62-516, 23 Pike & Fischer 1545) (R 1-5) of May

10, 1962. It amended Sec. 1.354 of the Rules by adding the following provisions: (1 Pike & Fischer RR. ¶51:354)

> Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.
>
> (a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in Section 3.25, 3.26 and 3.27 of this chapter will be accepted for filing only when the applications fall within the following categories:
>
> > (1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or from 100 watts to 250 watts or 500 watts.
> >
> > (2) Applications for new Class II-A stations specified in Sec. 3.22 of this chapter.
> >
> > (3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in Sec. 3.37 of the Rules with existing stations.
>
> (b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

Relationship of Appellant's Application to The Report and Order in Docket 6741

Appellant presently is the licensee of Radio Station WCLW, operating in Mansfield, Ohio, on frequency 1570kc.

On February 5, 1962, three months before the issuance of the freeze order, the Commission issued a Report and Order in Docket 6741 (FCC 62-117) (21 Pike & Fischer, RR. 1843) authorizing the assignment of new facilities or the improvement of existing facilities on some 20 frequencies not previously available. One of such channels was the frequency 1140kc. Immediately upon the issuance of said Report and Order, and on or about February 8, 1962, appellant engaged a consulting engineer to study the feasibility of improving the facilities of WCLW by changing its frequency from 1570kc to 1140kc, a much better frequency in terms of area, population coverage and reception, and work was commenced preparing an application to the Commission to accomplish such result.

It was necessary for appellant and its engineer to determine the site of the proposed new antenna and devise a directional pattern that would comply with the Commission's engineering standards. Appellant, its engineer and attorney proceeded with the greatest speed possible but could not complete the application until June 15, 1962 which was after the aforesaid freeze order adopted May 10, 1962. Appellant has spent substantial sums of money for engineering work, alternate site and antenna array survey and for other work preparatory to the filing of its application.

As pointed out in the Petition for Reconsideration, Waiver and Acceptance of Application, appellant's application complied with all of the criteria in the Commission's Report and Order of February 5, 1962, and with Section 1.351 of the Rules. Specifically, the Petition pointed out: R 6-23

"4. The Engineering Exhibit of Petitioner's application shows that there are no Class I-A channels 10kc and 30kc adjacent to the frequency 1140kc. KMOX, St. Louis, Missouri, 1120kc, 50kw, unlimited, is the Class I station assigned to this channel which is proposed to be duplicated by a new Class II-A assignment in California or Oregon. Petitioner's Engineering Exhibit shows that the KMOX 0.5mv/m contour fails to encompass the WCLW side by 260 miles and said site lies within the KMOX 50%, 0.5mv/m skywave contour. Accordingly, Petitioner's proposal complies with the application of Section 1.351 of the Commission's Rules with reference to the Class I-A frequency 1120kc."

"5. KSL, Salt Lake City, Utah, is the Class I-A station assigned to 1160kc, 20kc adjacent to Petitioner's proposal. The Commission's Report and Order of September 13, 1961 in Docket 6741 reserves the channel either for duplication by a Class II assignment 500 miles beyond the KSL 50%, 0.5mv/m contour or to permit KSL to operate with an elevation of maximum power above 50kw. Petitioner's Engineering Exhibit shows that the frequency is already duplicated by Station WJJD, Chicago, Illinois, 1160kc, 50kw, DA-1, L-KSL, and this station is located in the approximate area where any new Class II-A station might be located and forecloses such assignment in the states of Michigan and Ohio on a basis where Petitioner's proposal would preclude such station."

"Moreover, protection requirements of existing stations WIMA, Lima, Ohio, 1150kc, 1kw, DA-N; WCUE, Akron, Ohio (CP for Cuyahoga Falls, Ohio), 1150kc, 1kw, D; WCAR, Detroit, Michigan, 1130kc, 50kw-D, 10kw-N, DA-2; and WRVA, Richmond, Virginia, 1140kc, 50kw, DA-1 preclude the assignment of a new Class II-A assignment in central Ohio "where the WCLW proposal would be a factor preventing such an assignment. Accordingly, Petitioner's proposal complies with the Section 1.351 of the Commission's Rules with reference to the Class I-A frequency 1160kc. From the foregoing, Petitioner has shown that its proposal fully complies with

> the criteria in the Commission's Further Report and Order (FCC 62-117) released February 5, 1962, and with Section 1.351 of its Rules."

Furthermore paragraph 3 of the Petition pointed out that:

> "a grant would provide service to areas and populations which now receive co-channel interference from WPTW, Piqua, Ohio (1570kc, 250W, D), and adjacent channel interference from WTNS, Coshocton, Ohio (1560kc, 1kw, D) and that 169,055 or over 100% more persons would reside within WCLW's proposed 0.5mv/m contour. The existing service of WCLW will be extended in all directions and the service areas of WPTW, Piqua, Ohio and WTNS, Coshocton, Ohio, will be materially and substantially improved by a grant of Petitioner's application. WCLW operating as proposed on 1140kc will cause no co-channel or adjacent channel interference to any other existing station or pending application. It will receive no co-channel interference from any other station. WIMA will cause a de minimum amount of adjacent channel interference [to] 3,689 persons or 1.12% of the population residing within WCLW's normally protected 0.5mv/m contour."

The petition accordingly prayed that the Commission (1) reconsider and rescind the Report and Order of May 10, 1962 and the amendment to Section 1.354, or (2) reconsider the effectiveness of said order; or (3) waive Section 1.354 as amended and accept for filing and processing the said application, and (4) grant petitioner a hearing for the protection of his substantive rights.

The petition was denied in all respects by the Memorandum and Order of October 10, 1962. From said action of the Commission the appeal and petition for review were duly filed.

STATUTES AND RULES

The applicable sections of the Communications Act and of the Rules of the Commission are set forth in the Appendix to this brief.

STATEMENT OF POINTS

1. The Report and Order of May 10, 1962 was invalid because it attempted to cut off the right to file an application and to establish new criteria applicable only to new applications without reasonable advance notice, thus arbitrarily denying procedural due process to appellant and others similarly situated.

2. The Report and Order of May 10, 1962 was invalid because it arbitrarily permitted the processing of all pending applications on the basis of one set of criteria and prohibited the acceptance or any processing of any new applications except on the basis of a different set of criteria.

3. The Report and Order of May 10, 1962 was invalid because it was issued without compliance with the Rule Making Procedures of the Administrative Procedure Act and of the Commission.

4. The Commission was arbitrary and capricious in refusing to waive the provisions of the May 10, 1962 Report and Order so as to accept appellant's application, in view of appellant's undisputed showing that said application complied with all the provisions of Section 1.351 (b) of the Commission's Rules.

SUMMARY OF ARGUMENT

1. The freeze was a denial of procedural due process and arbitrary and capricious by altering the prevailing procedure and criteria for filing and processing applications without affording a reasonable time for applicants to file their applications, so that they might be considered on the same basis as pending applications. Prior to issuance of the order, appellant had the legal right to assume it could file its application for the frequency 1140kc provided it met the provisions of the order in Docket 6741 of February 5, 1962. In terms of time, appellant

also had the right to assume it was subject only to the then outstanding cut-off rules. The right to file an application and to have it considered on the merits and on the basis of the same criteria as pending applications is a substantive right granted by Secs. 308 and 309 of the Communications Act. The right cannot be arbitrarily taken away. Although reasonable cut-off provisions are valid, an order establishing a cut-off effective on the date the order is issued is unreasonable and invalid. The situation is analogous to legislative attempts to shorten statutes of limitation. These, to be valid, must provide a reasonable time to commence suit before the new bar takes effect.

2. The freeze order was arbitrary and capricious in authorizing the processing of all pending applications on the basis of one set of criteria, regardless of when filed, and prohibiting the acceptance and processing of any new applications except on the basis of a different set of criteria. There is no rational justification for such discrimination in the Commission's statement that it is necessary to avoid "inequities" to pending applicants due to their change in position. For appellant (like others similarly situated) had in fact changed its position prior to the freeze in preparing its application. This arbitrary discrimination violated the basic requirements of the Communications Act designed to protect private as well as public interest. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134.

3. The freeze was also invalid in that it failed to comply with the rule-making procedures of the Administrative Procedure Act and of the Commission itself. The freeze was more than a procedural measure. It establishes new and exclusive "interim criteria" under which certain applications are accepted and all others summarily rejected. One of said criteria, that the application bring service to a relatively underserved area, was com-

pletely new, and clearly substantive. Hence the freeze to be valid should have complied with Sec. 4 of the Administrative Procedure Act. Had this section been complied with, appellant (like others similarly situated) would have had an opportunity not only to express views on the so-called "freeze" but to complete and file its application before the effective date.

4. The Commission was, in any event, arbitrary and capricious in refusing to grant a waiver to enable filing of appellant's application. For some time prior to February 5, 1962, applications on 1140kc had been frozen by Sec. 1.351. On February 5, 1962, said section was amended opening up 1140kc for the filing and processing of applications meeting the standards set forth therein. Between February 5, 1962 and May 10, 1962, the Commission issued no public notice establishing any cut-off date applicable to 1140kc applications. Appellant was proceeding carefully and diligently in preparing its application in reliance on the February 5, 1962 order and the published cut-off rules which assured that the right to file would not be cut off except by a timely published notice which was never given. Furthermore, it is not denied that appellant's application complied fully with the standards established for 1140kc applications by the Commission's order of February 5, 1962. Indeed, in terms of benefits to the public, appellant's application would result in a 100% increase in coverage as well as improved coverage for other A.M. stations. It was arbitrary and capricious for the Commission to decide, out of hand, that these benefits were not at least as much in the public interest as the provision of a first interference-free service to 25% of any other proposed station, the filing of which was permitted under the freeze criterion.

ARGUMENT

I.

The freeze was a denial of procedural due process and arbitrary and capricious because it cut off the right of appellant to file an application and it established new criteria applicable only to new applications without reasonable advance notice.

It is appellant's position that the Commission may not, consistent with due process, amend its cut-off rules and establish new criteria without affording appellant a reasonable opportunity of filing an application which was being prepared in reliance on the cut-off provisions and criteria of the previous rules.

On May 9, 1962, appellant was entitled to file an application for change of frequency to channel 1140kc, provided it met with the provisions of Docket 6741 of February 5, 1962 and other sections of the rules, including Section 1.351. In terms of time, appellant's right to file an application and to have it considered on a par with other applications was subject to the "cut-off" provisions of Section 1.361. Under said provisions, if a mutually exclusive application were listed by the Commission in a public notice as ready for processing, appellant would have to file its application by the "cut-off" date specified in said public notice. But, except for this limitation, the Commission's Rules established no other procedure for a "freeze" or "cut-off" date by which an application would have to be filed to be entitled to being placed in the processing line for ultimate consideration and action in accordance with the criteria established for pending applications. No public notice establishing a cut-off date pursuant to Sec. 1.361 of the Commission's Rules had been issued.

Action with respect to an application for construction permit is judicial in character. Sec. 2(d)(e) Adminis-

trative Procedure Act, 5 U.S.C. 1001(d)(e). When an Administrative body acts judicially, timely and adequate notice are indispensable to due process. *Magnolia Petroleum Company* v. *Carter Oil Company*, 10 Cir., 218 F. 2d 1, 6, Cert. den. 349 U.S. 916; *Parker* v. *Lester*, 9 Cir., 227 F. 2d 708, 716; *Detrio* v. *United States*, 5 Cir., 264 F. 2d 658, 662; *Unity School of Christianity* v. *Federal Radio Commission*, 62 U.S. App. D.C. 52, 64 F. 2d 550. The *sina qua non* of notice is its informative monition.

In *Ridge Radio Corporation* v. *Federal Communications Commission*, 110 U.S. App. D.C. 277, 292 F. 2d 770, this Court said (at p. 773):

> "... when a particular cut-off date is fixed by public notice a potential applicant is entitled to rely on the terms of the notice."

Here, the outstanding rules, prior to May 10, 1962, fixed published cut-off dates as the sole basis for determining the timeliness of the filing of an application (See App. pp. 26, 28). No question of timely filing could arise until such a notice had been issued. The Commission having established this procedure, it was bound to observe it. *Service* v. *Dulles*, 354 U.S. 363, 372; *United States* v. *Shaughnessy*, 347 U.S. 260, 266-67. Appellant was entitled to rely on these cut-off rules until they were changed. And if the rules are changed, the demands of procedural due process require that appellant be accorded a reasonable opportunity to file its application before the change is made effective.

The right to file an application and to have it considered on the merits is a substantive right granted by Congress under Section 308 and 309 of the Communications Act of 1934, as amended (47 U.S.C. 308, 309). *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 329. In administering the Act, the Commission must observe "the basic requirements de-

signed for the protection of private as well as public interest". *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137. The denial of the right to file an application for a license goes to the very heart of procedural due process. The right cannot be arbitrarily taken away.

We recognize the authority of the Commission, in the interest of orderly administration, to prescribe regulations which establish reasonable cut-off dates for the filing of applications. And we have no quarrel with the doctrine that tardily filed applications need not be accepted for processing. *Federal Broadcasting System* v. *Federal Communications Commission*, 96 U.S. App. D.C. 260, 225 F. 2d 560, cert. den. 350 U.S. 923; *Ranger* v. *Federal Communications Commission*, 111 U.S. App. D.C. 44, 294 F. 2d 240. We insist, however, that a cut-off date must be reasonable. And an order establishing a cut-off date effective with the date of the issuance of the order, so that prospective applicants have no opportunity to timely file, is clearly unreasonable and invalid. It begs the question to assert that a rule establishing a cut-off date is procedural and not substantive within the meaning of Section 4(b) of the Adiministrative Procedure Act (54 U.S.C. §1003(b)). Regardless whether the rule is treated as procedural or substantive within the meaning of that provision, the substantive right to file an application is such an integral part of the entire process of the administration of the Communications Act that it cannot be taken away by a rule which becomes effective on the very day that it is issued. In this respect the rule is substantive and falls within the spirit if not the letter of Section 4(c) of the Administrative Procedure Act (5 U.S. §1003(c)) prescribing a thirty day period before substantive rules may become effective.[1]

[1] Even with respect to generally undisputed procedural rules changes, the Commission's practice has been to afford a reasonable period of time before the amendment takes effect. See, for ex-

The situation is analogous to legislative attempts to shorten statutes of limitations. It seems well settled that such enactments to be valid must provide that reasonable time be given for commencement of a suit or the filing of a claim before the bar takes effect. *McCloskey & Co.* v. *Eckart* (5th Cir. 1947) 164 F. 2d 257. The rule was thus stated in *United States* v. *Morena*, 245 U.S. 392, 397.

> "a limitation of time even upon the assertion of a right theretofore having no limitation upon its assertion, is not infrequent, and its legality is unquestionable *if a time reasonable, in view of the subject matter, be given.*"

Other cases are collected in 34 Am. Jur. Limitation of Action, §28; Annotations 49 ALR 1268-1270; 120 ALR 758.

The principle underlying these decisions seems applicable here. A new "cut-off" date or "freeze" can be imposed on the filing of new applications but only "if a time reasonable, in view of the subject matter, be given." Here, *no time* was given, and the freeze order was clearly invalid for that reason alone.

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ample, the following illustrative Commission orders: the amendment to Section 1.76 concerning notices of violation, adopted January 3, 1962, and effective February 13, 1962 (FCC 62-4, 27 F.R. 255); the amendment to Section 1.362, concerning conditional grants, adopted December 6, 1961, and effective December 18, 1961 (FCC 61-1436, 26 F.R. 11909); the amendment to Sections 3.30 and 3.205, relating to station location and program origination of standard broadcast and FM broadcast stations (in clarification of Commission policy), adopted September 26, 1961, and effective November 10, 1961 (FCC 61-1157, 26 F.R. 9338); the amendment to Section 1.359 relating to the time within which pre-grant petitions to deny broadcast applications may be filed, adopted September 13, 1961, and effective November 1, 1961 (FCC 61-1117, 26 F.R. 8841); the amendment to Sections 1.359 and 1.362, relating to procedures for local notice, adopted August 14, 1961, and effective August 21, 1961 (FCC 61-1031, 26 F.R. 7739); and the earlier amendment to these same rules on local notice, adopted July 26, 1961, and effective August 10, 1961 (FCC 61-992, 26 F.R. 6933).

The only reason assigned by the Commission for giving no advance notice was that (24 RR 1540, 1549):

> "if a freeze were to be put into effect it must be done without delay, since, on the basis of past experience, it was expected that any substantial postponement would result in a flood of several hundred hastily prepared applications."

But no such rationalization was set forth in the freeze order itself (23 R.R. 1545), nor do we see the validity of this position. The fact that some applications tendered may be "hastily" prepared seems completely irrelevant. If they are improperly prepared, the Commission can return them; if properly prepared, the speed or slowness of the work can scarcely affect the merits of the proposals.

Nor can *Ridge Radio* be distinguished on any theory that application of the attempted "cut-off" date in that case deprived the party of *Ashbacker* comparative hearing rights while here there may be no conflicts with other applicants. For, comparative hearing rights are not the only ones to which a prospective applicant is entitled. He has the right under the Act and under existing rules of the Commission to have a duly tendered application accepted and placed on the processing line of the Commission for consideration in the order in which the application was tendered for filing.

Section 1.354(c) provides that "applications for new stations or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first . . ."

Unless appellant is granted relief he will be irreparably damaged by being denied the benefit of this processing line procedure. He was entitled to have his application

accepted on June 15, 1962, and immediately assigned an appropriate number in the processing line, and the Commission should be required to not only now accept the application but to do so as of June 15, 1962 and assign the application an appropriate processing line number.

Otherwise, when the freeze is lifted, appellant will be assigned a processing line number as of the date his application is then accepted, and required to wait a correspondingly longer time for action on his application. Likewise there is danger that the Commission may adopt one set of policies for applications pending before the freeze and another set of standards for those filed after the freeze is lifted.

There is no rational basis for not accepting the applications, placing them in the processing line with appropriate numbers *and either processing all such applications or imposing a freeze on all pending applications.* The freeze here was imposed immediately and without warning. It satisfies no standard of adequate notice. It flouts all standards of procedural due process and should be declared invalid.

II.

The freeze order was arbitrary and capricious in authorizing the processing of all pending applications on the basis of one set of criteria and prohibiting the acceptance of any new applications except on the basis of a different set of criteria.

We do not question here the authority of the Commission to adopt a freeze *on the processing of all applications* in certain categories already filed or tendered for filing after the date of such freeze. This, for example, was the procedure followed in the Report and Order of September 30, 1948 (FCC 48-2182) imposing a freeze in connection with television applications so as to enable the Commission to formulate allocation policies culminat-

ing in the Sixth Report (Pike & Fischer RR. ¶91:45). There, applications were not refused, but together with all previously filed applications, were placed in a pending file. Conceivably, a similar freeze order might have been appropriate here.

This, however, was not done here. No freeze was established with respect to pending applications. Instead, the freeze was applied only to *new* applications, except those in narrowly defined exceptions, and it accorded applicants who relied on existing Commission regulations no opportunity to file applications so as to be placed on a par with previously filed applications. It permitted the processing of pending applications on the basis of criteria existing prior to May 10th and established a different set of criteria for the accepting and filing of new applications. In short, it arbitrarily placed an umbrella over applications then on file.

The result, of course, was to arbitrarily discriminate between applications which in all other respects were identical in purpose, dependent solely on the fortuitous circumstances that one application was tendered for filing on May 10, 1962, while the other was tendered for filing on May 11, 1962.

Nor is there any rational justification for such arbitrary and capricious classification in the statement of the Commission that non-application of the freeze to pending applications was necessary to avoid "inequities" to the pending applicants, because of change of position, whereas no such "inequities" would be caused to applicants who had not filed prior to May 10, 1962.

First of all this is a vague and obviously variable factor. Pending applications and non-filed applications can involve all gradations of change of position. A pending application, filed May 10, 1962 may have involved expenditure of 30 hours of work and $1,500 of engineering and legal expense, or it may have involved expenditures

of 100 hours and $5000 of engineering and legal expense. One case may be near the top of the processing line, another near the bottom. One may be in the midst of a comparative hearing, another may be pending before the Review Board after initial decision. All these are lumped together as involving "equities" meriting exception from the freeze.

But a more serious aspect of the arbitrary and capricious action of the Commission is involved here. For an application filed on May 10, 1962 may have involved the expenditure of 30 hours of work and $1,000 of expense, whereas an application under preparation for months but not yet quite ready for filing may have required 200 hours of work and $5,000 of expense.

Thus, it was arbitrary and capricious to provide that *all* pending applications continue to be processed, regardless of how recently they were filed, and to provide that *no* new applications would be processed no matter how much work had been done on the application prior to issuance of the order or how soon after the freeze order the application was ready for filing. It was equally arbitrary and capricious for the Commission to continue to process pending applications on the basis of then existing criteria while conditioning the acceptance and processing of new applications on a different set of criteria. By such arbitrary action, the Commission failed to observe the basic requirements of the Communications Act designed for the protection of private as well as public interest. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, supra.

III.

The freeze was invalid in that it failed to comply with the Rule Making Procedures of the Administrative Procedure Act and of the Commission itself.

As pointed out by Commissioner Hyde in his Dissenting Statement (24 Pike & Fischer RR. 1559) the "freeze"

order is much more than a procedural step. It establishes new and exclusive "interim criteria" under which certain applications are accepted. All other applications are summarily rejected and it applies this "interim criteria" only to new applications. As a result, grants may be made on pending applications which may well present engineering and other obstacles to grants of the rejected applications when the freeze is lifted.

One of the "interim criteria" is that the application must bring service to relatively underserved areas. This test injected a completely new criterion for allocating new stations. Hence, it was clearly substantive in character and the rule was invalid since it did not comply with the rule-making provision of Section 4 of the Administrative Procedure Act.[2]

Had the Commission complied with Section 4 of the Administrative Procedure Act, appellant and others similarly situated would have had an opportunity to participate in the rule-making proceeding, and the rule would have been effective no earlier than 30 days after the publication.[3] Hence, appellant and presumably many similarly situated, would have had opportunity not only to express views on the so-called "freeze" but to complete and file its application prior to its effective date.

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[2] 5 U.S.C. 1003. The Commission Rules adopt these provisions. Sec. 1.211 et seq. Pike & Fischer RR ¶ 51.1211 et seq.

[3] 5 U.S.C. 1003(c). "The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restrictive or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule." This provision is incorporated in the Commission's Rule Sec. 1.219(a) "Any rule issued by the Commission will be made effective not less than thirty days prior to the time it is published in the Federal Register. . . ."

IV.

The Commission was arbitrary and capricious in refusing to grant a waiver to enable filing of appellant's application.

Aside from the considerations of general applicability relating to the validity of the freeze order, there is an additional element present in this case which demonstrates that the Commission acted arbitrarily and capriciously in refusing to accept appellant's application for filing.

For some time prior to February 5, 1962, under a blanket freeze imposed by Sec. 1.351 of the Rules, the processing of *all* applications on *all* Class I-B channels within 30kc of Class I-A channels had been deferred. (This freeze had become effective only after advanced notice.) One of the channels included in this freeze was the frequency 1140kc. The freeze rule was partially revised on September 13, 1961 by a Memorandum Opinion and Order pursuant to which the processing of applications relating to certain channels was resumed (21 Pike & Fischer RR. 1801). However, applications relating to other channels, including the frequency 1140kc, continued to be frozen. Finally on February 5, 1962, the Commission issued a Memorandum Opinion and Order, under which Section 1.351(b) of its Rules was amended to reflect standards developed by the Commission and processing of applications complying with these standards was resumed (Pike & Fischer RR. 1843). The The Commission stated in its Memorandum Opinion and Order (¶4): (App. p. 32)

> "New applications which contain proper engineering data to demonstrate their compliance with the standards *will now be accepted for filing*. Applications now on file for the channels adjacent to the unduplicated Class I-A channels will be studied in light of the standards set forth in the amended Rule.

> Those applications found not to conform to the standards will be placed in the pending file and held without further processing or consideration until September 1, 1964, or such earlier date as may be announced. *Applications conforming to all standards set forth in the amended Rule will be acted upon in normal course.*" (Emphasis supplied)

One of the frequencies opened for the filing and processing of applications was the frequency 1140kc. In reliance upon Sec. 1.351 of the Rules as amended by the February 5, 1962 Memorandum Opinion and Order, appellant commenced its engineering studies and surveys preliminary to filing an application to operate on the frequency 1140kc. It admittedly has expended substantial sums of money and effort in this preliminary work. There was no cut-off date established by the February 5, 1962 Memorandum Opinion and Order, so that the general cut-off regulations prescribed by Sections 1.354 and 1.361 of the Rules applied. Between February 5, 1962 and May 10, 1962 the Commission issued no public notice establishing a cut-off date applicable to appellant's proposed application. Thus, appellant was proceeding carefully and diligently in the preparation of its application to make certain that the standards adopted by the Commission after years of study would be complied with. In so proceeding, appellant relied upon the published regulations of the Commission which assured that his right to file would not be cut off except by a timely published notice.

It was in this posture of the matter that the Commission without warning and without affording to applicant *any opportunity whatsoever* to file its application issued its Memorandum Opinion and Order of May 10, 1962.

As pointed out in appellant's Petition for Reconsideration, Waiver, and Acceptance of Application (R 6-23), the application which appellant tendered for filing on June 15, 1962, complies fully with all Rules and Stand-

ards of the Commission in effect on May 10, 1962 including those established by the Commission in its Memorandum Opinion and Order of February 5, 1962. The only Class I-A stations operating on frequencies within 30kc of the frequency 1140kc are KSL at Salt Lake City, Utah on 1160kc and KMOX at St. Louis, Missouri on 1120kc. Appellant's proposal therefore meets the criteria of Section 1.351(b) of the Commission's Rules in every respect and does not preclude the possible 750KW operation of KSL or the potential establishment of Class II-A stations on 1120kc or 1160kc. Furthermore, the application showed that a shift of its operation to 1140kc would provide service to 169,055 people (an increase of 100%) and would improve the existing allocations on 1570kc and 1560kc, thus permitting an expansion in the existing coverage of the station at Piqua, Ohio and at Coshocton, Ohio. No additional interference would be caused to any existing station, co-channel or adjacent channel to 1140kc. It is unchallenged that unless applicant is permitted to utilize the frequency 1140kc at Mansfield, the frequency will be wasted.

Thus in terms of benefit to the public, an increase of 100% in the coverage of appellant's station by shifting it to frequency 1140kc with the consequent improvement to the service areas of two other existing stations represents a more significant improvement than the provision of a first service to 25% of the proposed contour of a hypothetical station such as comes within exception III of the exceptions to the freeze order set forth in Section 1.354 Note. Appellant's proposal squarely falls within the rationale of the exceptions set forth in the Commissioner's freeze order of May 10, 1962. It complies fully with the standards prescribed by the Commission Order of February 5, 1962.

Section 1.15 of the Commission's Rules provides that "any provision of the Rules may be waived . . . on peti-

tion if good cause therefor is shown." (App. p. 24). In accordance therewith appellant gave to the Commission the foregoing meritorious reasons for waiver of Section 1.354 of its Rules, as amended by its Report and Order of May 10, 1962, and for acceptance of its application. (R 6-23).

Accordingly appellant came within the doctrine of *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, that general rules cannot bar the right to a hearing on meritorious applications where the applications "set out adequate reasons why the Rules should be waived or amended." (351 U.S. at p. 205). (R 6-23).

The Commission nevertheless bound itself inflexibly and exclusively to its May 10, 1962 Order and returned appellant's application without consideration of the merits of appellant's petition for waiver of said Rule and for acceptance of its application. (R 26-45).

It was arbitrary and capricious for the Commission to decide, out of hand, that these undisputed benefits were not at least as much in the public interest as the provision of a first interference-free service to 25% of any other proposed station.[4] Considerations of equity and fairness require that appellant's application be accepted and processed on the same basis as applications filed prior to May 10, 1962. If the Commission's freeze order should, by chance, not be ruled invalid, the Commission nevertheless should be instructed to consider and grant

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[4] This, of course, demonstrates the soundness of Commissioner Hyde's position that the freeze order was establishing a new substantive order. That the Commission itself has recognized the unsoundness of its position is evidenced by its action in accepting for filing the application of Charlottesville Broadcasting Corp., to change the frequency of Station WINA, Charlottesville, Virginia to 1070kc. This action is discussed in *Kessler* v. *Federal Communications Commission*, Case No. 17363.

appellant's request for a waiver thereof and accept for filing and processing appellant's application on the basis of the same standards and criteria applied to other timely filed applications.

CONCLUSION

The Commission "freeze" order offends basic principles of procedural due process. The fact that it is a "freeze" and not a permanent limitation on filing is inconsequential. For by refusing to permit the filing on June 15, 1962, the Commission has deprived appellant of its place on the processing line to which it is entitled under the Commission Rules and is prevented from having its application considered on the basis of the standards and criteria being applied to other timely filed applications. Furthermore, the communities which it desires to serve more efficiently are not being given the consideration to which they are entitled under the Communications Act. The freeze order should be set aside as invalid. In any event the proceedings should be remanded to the Commission with instructions to consider and grant appellant's request for a waiver thereof and accept appellant's application for filing and processing, effective June 15, 1962.

Respectfully submitted,

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and Petitioner

APPENDIX

Rules of the Federal Communications Commission:

§1.15

Suspension, amendment or waiver of rules.—The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

§1.219

Effective date of rules.—(a) Any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register except as otherwise specified in paragraphs (b) and (c) of this section.

(b) For good cause found and published with the rule, any rule issued by the Commission may be made effective within less than 30 days from the time it is published in the Federal Register. Rules involving any military, naval or foreign affairs function of the United States; matter relating to agency management or personnel, public property, loans, grants, benefits or contracts; rules granting or recognizing exemption or relieving restriction; or organization rules, procedure or practice, or interpretative rules and statements of policy may be made effective without regard to the 30 day requirement.

(c) In cases of alterations by the Commission in the required manner or form of keeping accounts by carriers, notice will be served upon affected carriers not less than 6 months prior to the effective date of such alterations.

§1.351

(b) (1) Until September 1, 1964, or such earlier date as may be announced, the provisions of this paragraph will apply to all applications for the following frequencies:

680, 690, 710, 730, 790, 800, 810, 850, 860, 900, 1010, 1050, 1060, 1070, 1130, 1140, 1150, 1170, 1190, and 1220kc.

(2) Applications for new stations on, change of existing stations to, or for any major change in operation of stations presently operating on the designated frequencies will be accepted for filing and acted upon in normal course provided they are accompanied by appropriate exhibits and necessary supporting data to show clearly the following with respect to all Class I-A channels within 30kc of the designated frequency:

(i) The proposed transmitter site is located inside the area encompassed by a 500 mile extension of the 0.5 mv/m-50% nighttime contour of Class I-A stations on unduplicated channels.

(ii) No interference or prohibited overlap would be caused to Class I-A stations on unduplicated I-A channels, assuming such stations operate with power increased to 750 kw with their present antenna systems and radiation patterns.

(iii) No interference or prohibited overlap would be caused to an assumed Class II-A station on an unduplicated channel, radiating at least 1238 mv/m omnidirectionally from the nearest point on the boundary described in subparagraph (i) of this paragraph.

(iv) No interference or prohibited overlap would be caused to presently specified Class II-A assignments, assuming such facilities to be located at the nearest point on the boundary of the nearest state specified by the

Clear Channel Decision released September 14, 1961, and assuming such II-A facility radiates at least 1238 mv/m omnidirectionally; and, in the case of frequencies within 30kc of 750kc or 760kc, the proposed facility would not cause interference to Class II assignments at San Diego, California, or Anchorage, Alaska, specified in §3.25(a) of this chapter.

§1.354

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this

paragraph must be filed if they are to be grouped with any of the listed applications.

* * * *

(h) If, upon examination, the Commission finds that the public interest, convenience and necessity will be served by the granting of an application, the same will be granted. If, on the other hand, the Commission is unable to make such a finding and it appears that a hearing may be required, the procedure set forth in §1.362 will be followed.

* * * *

NOTE: Pending the Commission's restudy of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§3.25, 3.26 and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV station on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in §3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the pro-

posed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in §3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

§1.361

(c) In making its determinations pursuant to the provisions of paragraph (b) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The Close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the Close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

* * * *

NOTE: Paragraph (c) (2) of this section applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also §§1.106(b) (1) and 1.354 (c) and (h).

Statutes:

Administrative Procedure Act, Section 4

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sec-

tions 1006 and 1007 of this title shall apply in place of the provisions of this section.

(c) The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

Federal Communications Act

Section 308(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it. . . .

Section 309(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * *

(d)(2) . . . if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section . . . (Subsection (e) requires that the application be designated for hearing).

B
FCC 62-117
14521

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

In the Matter of

Clear Channel Broadcasting in) Docket No. 6741
The Standard Broadcast Band)

FURTHER SUPPLEMENT TO REPORT AND ORDER

By the Commission: Commissioners Hyde and Ford voting to defer action; Commissioner Lee abstaining from voting.

1. On October 27, 1961, the Commission adopted its first Supplement to the Report and Order of September 13, 1961 in the above-captioned Docket concluding the clear channel proceeding. The purpose of the supplemental Order was to effect certain modifications with regard to the treatment of applications for frequencies within 30 kc of one of the 12 unduplicated Class I-A clear channels and, as such, the action represented a reconsideration by the Commission of paragraphs 63-65 of the Report and Order of September 13, 1961.

2. In the Supplemental Report, we stated that applications for new stations on, for change of frequency to, or to increase power or operate during nighttime hours not previously authorized on a frequency within 30 kc of one of the 12 unduplicated channels would not be accepted for filing on or after October 30, 1961. We stated further:

"Applications for such facilities filed prior to October 30, 1961 will be studied in the light of their likely impact upon the possible future use of the unduplicated clear channels. From such study, it is contemplated that more precise engineering criteria might evolve which can then be applied in acting upon those applications now pending and announced as standards to govern the acceptance of future applications on these adjacent frequencies."

3. The Commission has studied 107 pending applications for these adjacent channels and from this study has developed standards to govern our future practice in accepting and acting upon such applications. In substance, these standards reflect our consideration of two possible future uses of the twelve unduplicated Class I-A channels: high power, to a maximum of 750 kc, and duplication in specified areas with a new Class II unlimited time assignment similar to proposed assignments adopted in our Report and Order of September 13, 1961.

4. Accordingly, Section 1.351(b) of the Commission's Rules will be amended to reflect the standards so developed. New applications which contain proper engineering data to demonstrate their compliance with the standards will now be accepted for filing. Applications now on file for the channels adjacent to the unduplicated Class I-A channels will be studied in light of the standards set forth in the amended Rule. Those applications found not to conform to the standards will be placed in the pending file and held without further processing or consideration until September 1, 1964, or such earlier date as may be announced. Applications conforming to all standards set forth in the amended Rule will be acted upon in normal course.

5. Additionally, the paragraphs of Section 1.351 will be rearranged, primarily for purposes of greater clarity. As amended, Section 1.351(a) refers only to those ten adjacent channels which are within 30 kc of a Class I-A

channel for which duplication has been provided but which are *not*, at the same time, within 30 kc of an unduplicated channel. The amended Section 1.351(a) also incorporates a more precise definition of "undue risk of interference" to a possible new Class II assignment on a duplicated channel. Section 1.351(b) now refers to those twenty channels which are adjacent to both duplicated and unduplicated Class I-A channels and sets forth the criteria which will govern our future acceptance of, and action upon applications for those channels. Section 1.351(c) sets forth analogous criteria for those three channels which are within 30 kc of unduplicated channels and not, at the same time within 30 kc of any channel for which duplication has been provided.

6. The standards adopted herein are simply a further refinement and clarification of matters previously decided. Because we had not previously arrived at the precise criteria to be applied in accepting and acting upon applications involving frequencies adjacent to one or more of the Class I-A channels, we had provided, in our September 14, 1961 Report and Order, that certain applications would be accepted for filing and held in a pending file. Having now formulated the criteria, it becomes less of an administrative burden to accept only those applications which contain the requisite showing of compliance with the criteria announced herein. This change of procedure is in the public interest and does not affect any substantive rights. See *Fort Harrison Telecasting Corporation* v. *F.C.C.* U.S. App. D.C., No. 16,321, decided December 14, 1961, 22 RR 2031. We note further that our present action is a relaxation of the restrictions announced in the Supplement to Report and Order adopted October 27, 1961, (FCC 61-1293), in which we amended the Rules to provide that *no* applications for new stations, power increases, or new nighttime operations on frequencies adjacent to the twelve unduplicated Class I-A channels would be accepted or considered.

7. In one respect, the rules now adopted impose an additional restriction, in that applications for major changes in facilities other than power increases or new nighttime hours—i.e., changes involving new directional or non-directional operation—will be subject to the provisions of Section 1.351, where they would have possible impact on potential uses of the twelve unduplicated I-A channels. Hitherto, such applications have not been subject to any such restrictions (See § 1.351 (b) (4), as adopted in the September Report and Order and left unchanged in the October Supplement). With respect to the very few pending applications falling into this category no such problems of possible impact exist; therefore this change affects, at most, only potential applicants. Such additional restriction is clearly required if possible uses of the unduplicated I-A channels are to be protected.

8. Authority for adoption of the rule changes herein is contained in Sections 4(i) and (j), 303 and 307(b) of the Communications Act of 1934, as amended. Section 4(a) of the Administrative Procedure Act exempts from the requirement of publication of general notice of proposed rule making "rules of agency organization, procedure, or practice". Because the rule changes herein are procedural, notice and public procedure thereon are not required. Similarly, the effective date provision of Section 4(c) of that act applies only to substantive rules whereas the present Rule changes are, as noted above, both procedural and for the most part, a relaxation of existing restrictions. (See also Sections 1.311(a) and 1.219(b) of our Rules.) We find, therefore, that the public interest will be served by making the Rules changes herein effective immediately and, for these reasons, and for the reasons stated in the preceding paragraphs, notice and rule-making would not serve the public interest.

9. In view of the foregoing, IT IS ORDERED, This 31st day of January, 1962, that Section 1.351 of the Commis-

sion's Rules Is FURTHER AMENDED as set forth in the Appendix hereto, effective January 31, 1962.

FEDERAL COMMUNICATIONS COMMISSION

BEN F. WAPLE
Acting Secretary

Released: February 5, 1962

NOTE: Rules changes herein will be covered by T.S. I-16.

APPENDIX

See pertinent portions of Section 1.354 as amended, ibid pages 25-26

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13

BRIEF FOR APPELLANT-PETITIONER,
GOOD MUSIC BROADCASTING CO.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

397

No. 17,424

GOOD MUSIC BROADCASTING CO.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

No. 17,478

GOOD MUSIC BROADCASTING CO.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

On Appeal and on Petition for Review of a Report and Order and a Memorandum Opinion and Order of the Federal Communications Commission

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March 20, 1963

STATEMENT OF QUESTIONS PRESENTED

By order of this Court dated January 25, 1963 cases numbered 17,379, 17,415, 17,421, 17,424, 17,425, 17,474, 17,478, 17,479, 17,481, and 17,483 were consolidated for all purposes. Counsel for Appellants or Petitioners in each of these cases entered into a stipulation approved by order of this Court dated February 13, 1963, agreeing that the first six questions presented [1] in the case consolidated cases are as follows:

1. Does the Federal Communications Commission's "freeze" rule set forth in a "Note" following 47 CFR 1.354 constitute a substantive rather than a procedural rule change, and if so, was the Commission required to give notice and/or follow the public rule making procedure prescribed by Sections 3 and 4 of the Administrative Procedure Act, 5 U.S.C. 1002 and 1003?

2. Did the Commission act arbitrarily and capriciously, and did it deprive each appellant[2] of due process of law, when, without a hearing as provided in Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, it returned each appellant's application?

3. Does the Commission's "freeze" rule violate the doctrine of Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, that broadcasting is to be left in the area of free competition?

4. Did the Commission's failure to give any advance notice of the "freeze" constitute arbitrary and capricious action which deprived each appellant of due process of law?

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[1] Question 7 in the stipulation is not applicable to Case Nos. 17,424 and 17,478 regarding Good Music Broadcasting Co.

[2] The word "appellant" as used herein refers both to appellants and to petitioners; the word "appellee" refers both to appellees and to respondents.

5. Was the Commission's refusal to consider each appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

6. Was there a reasonable relationship between the Commission's imposition of the "freeze" and its resultant return of appellants' applications on the one hand, and the rule making announced in the Commission's Report and Order of May 10, 1962, on the other hand?

INDEX

TABLE OF AUTHORITIES

Cases:

* Case chiefly relied marked by asterisk.

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On Appeal and on Petition for Review of a Report and Order and a Memorandum Opinion and Order of the Federal Communications Commission

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BRIEF FOR APPELLANT-PETITIONER, GOOD MUSIC BROADCASTING CO.

JURISDICTIONAL STATEMENT

Appellant-Petitioner, Good Music Broadcasting Co., (hereinafter referred to as Good Music) seeks review and reversal of two orders of the Federal Communications Commission (hereinafter

referred to as Commission), the first, released May 10, 1962 (FCC 62-516; R. 1-5, reported at 23 Pike & Fischer, R.R. 1545) and the second released October 15, 1962 (FCC 62-1052; R. 18-37, reported at 24 Pike & Fischer, R.R. 1540), which resulted in the return of Good Music's application for increase in power and change of transmitter site of standard broadcast station WKTX operating on 1600 kc in Atlantic Beach, Florida, without the required consideration by the Commission.

Case No. 17,424 is an appeal from these two orders under Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(b), and Rule 37 of the Rules of this Court because Good Music is an ". . . applicant for a construction permit . . . whose application is denied by the Commission", in that, by refusing to accept Good Music's application and returning such application without action, the Commission has effectively denied Good Music's application without the hearing required by Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309. Good Music submits that this Court has jurisdiction fully to review and reverse the orders of the Commission here appealed from under Sec. 402(b)(1), supra.

Case No. 17,478 is a petition for review of the two aforementioned orders of the Commission brought in this Court pursuant to Sec. 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(a), and Sec. 2 of the Judicial Review Act of 1950, as amended, 5 U.S.C. Sec. 1032. Sec. 3 of the Judicial Review Act, 5 U.S.C. Sec. 1033, provides that venue for such a petition may be in this Court.

Good Music believes and avers that its appeal in Case No. 17,424 is properly within the jurisdiction of this Court under the decisions in Ranger v. F.C.C., 111 U.S. App. D.C. 44, 294 F.2d 240 (1961) and Ridge Radio Corp. v. F.C.C., 110 U.S. App. D.C. 277, 292 F.2d 770 (1961).

In the event that the Court should hold that Good Music may not appeal under Sec. 402(b), supra, the Court has jurisdiction by virtue of the petition for review in Case No. 17,478 to set aside, annul and suspend

the orders of the Commission here appealed from under Sec. 402(a) of the Communications Act, supra, and Sec. 2 of the Judicial Review Act of 1960, supra.

STATEMENT OF THE CASE

In reliance upon the Communications Act and the Commission's Rules with regard to filing of applications in the broadcast service, particularly Sec. 308 of the Communications Act of 1934, as amended, 47 U S.C. Sec. 308, and Secs. 1.304 (a) and 1.354(c) of the Commission's Rules, 47 C.F.R. Secs. 1.304, 1.354(c), Good Music undertook in March of 1962 to prepare an application to increase the power of its station, WKTX, from 1 kw to 5 kw, continuing operation on 1600 kc in Atlantic Beach, Florida, daytime hours only (R. 8-14). Operating primarily as a "good music" station, WKTX has received a number of comments from listeners that they are unable satisfactorily to receive Station WKTX (R. 14). As a result of these comments, consideration was given by Good Music to ways and means to satisfy the public demand for improved reception. It was concluded that an increase in power would be the best course to pursue in meeting the needs stated by listeners (ibid). The analysis of relevant engineering factors indicated that a new transmitter site would have to be acquired farther inland than the present site close to the Atlantic Ocean beach in order to escape the effects of higher electrical conductivity of sea water along the coast (ibid). Also it was initially thought that interference might be caused to a co-channel radio station, WNGA, located in Nashville, Georgia, and field intensity measurements were taken in the month of March, 1962, which established that no such interference would be created (ibid).

At this time, steps were then taken to secure an appropriate site and complete the preparation of the necessary portions of an application for filing with the Commission. Before this work could be completed, the Commission announced its immediately effective order of

May 10, 1962, Commissioner Hyde dissenting, one of the orders here appealed from (R. 1-5).[1] This order proposed to prohibit thereafter filing of applications in the standard broadcast service, such as Good Music's for an indeterminate period of time.[2] Prior to the issuance of this order, Good Music had expended money and effort in taking field intensity measurements and preparing the application (ibid).

The engineering statement accompanying the Good Music application showed that WKTX, operating at the increased power proposed, would not cause or increase interference to any existing station, but in fact it would reduce the interference now caused to existing Station WELE, Daytona Beach, Florida, operating on an adjacent channel (R. 15). The Good Music application, likewise, does not conflict with any pending application and, if it were granted, the population served would increase from 235,524 persons to 471,647 persons, an increase of more than 100% (ibid). Furthermore, the persons living within the present service area would receive a substantially improved signal (ibid.)

Applicant tendered its application with the Commission on June 8, 1962, together with a pleading seeking review of the May 10 order (R. 1-5) entitled "Petition for Acceptance of Application for Filing, for Waiver of Section 1.354 and/or Reconsideration of Order Amending Said Section, and for Other Relief" (R. 8-17).

Subsequently, on October 10, 1962 the Commission adopted an order (R. 18-37) affirming its order of May 10, 1962, again with Commissioner Hyde dissenting (R. 1-5), directing that Good Music's application be returned. The application was returned to Good Music by letter dated October 17, 1962 (R. 39).

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[1] A Public Notice of the Commission released at approximately 3 P.M. on May 10th (Report No. 4188, Mimeo No. 20050) was the first notice of the partial "freeze" on standard broadcast applications. Potential applicants thus had until the Commission's offices closed at 5:00 o'clock on that day to file complete applications.

[2] There were limited exceptions, none of which were applicable to the Good Music power increase proposal.

Good Music thereupon filed a notice of appeal under Sec. 402(b) of the Communications Act of 1934, as amended, supra, on November 14, 1962, which is Case No. 17,424. Subsequently Good Music filed its petition for review on December 12, 1962 in Case No. 14,778 for review of the Commission's Orders under Sec. 402(a) of the Communications Act of 1934, as amended, supra.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 151, et seq., the Administrative Procedure Act, 5 U.S.C. Sec. 1001, et seq., and the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. Sec. 1.1, et seq., are set forth in the Appendix to this brief.

STATEMENT OF POINTS

1. The Commission's order of May 10, 1962, purported to adopt a rule of substantive effect on Good Music's rights without the prior notice, opportunity to comment and prior publication required by the Administrative Procedure Act.

2. The Commission's order of May 10, 1962, even if procedural only, unreasonably, arbitrarily and capriciously denied due process and basic fairness to Good Music.

3. The Commission, under all circumstances before it, was arbitrary and capricious, assuming, arguendo, the validity of the amendment of its rules by order of May 10, 1962, in its refusal to waive the provisions of such rule change with respect to Good Music.

SUMMARY OF ARGUMENT

Point I

The Commission's order of May 10, 1962 (R. 1-5) amending Sec. 1.354 of its Rules, 47 C.F.R. Sec. 1.354, by adding a Note thereto, was a substantive change in the rules requiring compliance with Sec. 4

of the Administrative Procedure Act, 5 U.S.C. Sec. 1003. This section of the statute requires that agencies give prior notice of proposed rule making, afford interested parties an opportunity to comment thereon, and subsequently, publish the text of the proposed rule at least thirty days prior to its effective date. The Commission did not comply with these requirements; therefore, its order of May 10, 1962 (R. 1-5) must be reversed; consequently, its order of October 10, 1962 (R. 18-37) must also be reversed because it is based on the prior unlawful order.

Point II

Sections 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 308, 309, and Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), give potential applicants a right to file applications for broadcast stations and to have a hearing thereon before an application is denied. Sec. 311 of the Act, 47 U.S.C. Sec. 311, is designed to encourage potential applicants to file so that the Commission may determine the best possible applicants for broadcast facilities. Sec. 1.354(c) of the Commission's Rules gives potential applicants a right to thirty days notice of the deadline by which a conflicting application must be filed in order to have consideration with a previously filed application.

Good Music's application to improve the facilities of its existing station, WKTX, in the public interest does not conflict with any pending application; therefore no deadline for filing it existed. In reliance on the foregoing provisions of the Communications Act and the Commission's Rules, it prepared its application. Since there was no conflicting application and no deadline, Good Music is entitled to at least as much notice as a potential conflicting applicant of thirty days, and the issuance of the Commission's May 10 order (R. 1-5) effective that day, gave no effective notice that the right to file applications would be cut off depriving Good Music of its statutory rights and denying Good Music basic fairness and due process. The Commission's order of May 10, 1962 (R. 1-5) and the subsequent order of October 10, 1962 (R. 18-37) deny-

ing reconsideration of the earlier order must both be reversed.

Point III

The Commission was arbitrary and capricious and abused its discretion in its refusal to waive the provisions of its amendment to Sec. 1.354 of its Rules, supra, assuming, arguendo, such amendment was valid, with respect to the Good Music application, because the proposed service of Good Music would more than double the people to be served by its station, would reduce the interference caused to another existing station, and would not create any interference problems with any other existing or proposed station. Under the circumstances, grant of the Good Music application would not be contrary to the Commission's stated purpose in invoking the "freeze", and it was thus, arbitrary, capricious, and an abuse of discretion to deny waiver to Good Music, especially since such waiver was denied without any discussion by the Commission of the factual basis for such a waiver in its order of October 10, 1962 (R. 18-37). This order must therefore be reversed.

ARGUMENT

I. The Commission's Order of May 10, 1962, Purported to Adopt a Rule of Substantive Effect on Good Music's Rights Without the Prior Notice, Opportunity to Comment and Prior Publication Required by the Administrative Procedure Act.

Secs. 308(a) and 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 308(a), 308(b), together provide that the Commission may grant construction permits only on written application therefor and that the Commission may prescribe rules with regard to the contents of such applications. Sec. 1.304(a) of the Commission's Rules, 47 CFR Sec. 1.304(a), sets forth in general the requirements for contents of applications and it is apparent therefrom and from the form to be used (See 1 Pike & Fischer, R.R. 98:103 et seq.) that there

of the Administrative Procedure Act, 5 U.S.C. Sec. 1003. This section of the statute requires that agencies give prior notice of proposed rule making, afford interested parties an opportunity to comment thereon, and subsequently, publish the text of the proposed rule at least thirty days prior to its effective date. The Commission did not comply with these requirements; therefore, its order of May 10, 1962 (R. 1-5) must be reversed; consequently, its order of October 10, 1962 (R. 18-37) must also be reversed because it is based on the prior unlawful order.

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is considerable work and expense involved in preparing such an application.

In reliance on the foregoing provisions of the Communications Act and the rules, Good Music commenced preparation as early as March, 1962, of its application to increase power of its station, WKTX, and to change its transmitter site. Electrical field intensity measurements were taken at some expense, a new site was obtained, also at some expense, and a decision was made to prepare an application based on the measurements which indicated that electrical interference probably would not result (R. 14-15).

Preparation of Good Music's application proceeded with no urgency because the Commission had not established a "cut-off date" by which Good Music's application would have to be filed in accordance with Sec. 1.354(c) of the Commission's Rules, 47 C.F.R. Sec. 1.354(c). Good Music relied on this rule which provides that any potential applicant will have at least thirty days notice if any such "cut-off date" were to be established in the future in accordance with the clear language of the rule itself.

Good Music also relied on the provisions of Sec. 311 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 311, which contemplates that applicants will give public notice of the filing of their applications so that conflicting applications are invited to be filed subsequent thereto.

Furthermore, Good Music relied on Sec. 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(a), which grants a statutory right to an applicant to a hearing before its application is denied, see Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 330 (1945).

The foregoing provisions of the Communications Act, and the doctrine of the Ashbacker case demonstrate that the right to file an application and have it considered is a substantive right. Nothing in the

Commission's "cut-off" rules[3] affects the basic right to file, these rules are concerned only with the time within which conflicting applications must be filed in order to be considered with previously filed applications. In dissenting to the adoption of the May 10 order here appealed from (R. 1-5), Commissioner Hyde stated that the order was " . . . essentially a substantive policy decision and ought to be the subject of a public notice before decision." (R. 4.)

Because the rule amendment in the May 10, 1962 order (R. 1-5) was a substantive change, the Commission was required to give prior notice, conduct rule making, and subsequent thereto, publish rules effective not less than thirty days after publication in accordance with Sec. 4 of the Administrative Procedure Act, 5 U.S.C. Sec. 1003. Consequently, on the sole ground that the Commission has failed to comply with the provisions of the Administrative Procedure Act, its order of May 10, 1962 (R. 1-5) must be reversed; likewise the order of October 10, 1962 (R. 18-37) which affirmed the prior illegal order must also be reversed.

II. The Commission's Order of May 10, 1962, Even if Procedural Only, Unreasonably, Arbitrarily and Capriciously Denied Due Process and Basic Fairness to Good Music.

Assuming arguendo that the May 10, 1962 rule amendment is a procedural rule alone not subject to the requirements of Sec. 4 of the Administrative Procedure Act, supra, nevertheless the Commission has arbitrarily and capriciously ignored basic requirements of procedural due process and fairness. What is here involved is a fundamental question of notice to applicants. The Supreme Court has held that all Commission actions must observe " . . . the basic requirements designed for the protection of private as well as public interest." F.C.C. v. Pottsville Broadcasting Company, 309 U.S. 134, 138 (1940),

[3] Secs. 1.106(b)(1), 1.354(c), and 1.361(c), 47 C.F.R. Secs. 1.106(b)(1), 1.354(c), 1.361(c).

F.C.C. v. WJR, 337 U.S. 265, 283 (1949). Basic requirements of fairness to potential applicants who, in reliance on the right to file an application inherent in the statutory provisions cited under Point I, supra, and the right under Sec. 1.354(c) of the Commission's Rules, supra, to at least thirty days prior notice of the deadline for filing an application in conflict with a pending application, require reversal of the Commission's May 10, 1962 order (R. 1-5) because the lack of notice of such an order is a denial of basic fairness and due process. A potential applicant entitled to thirty days notice of the deadline for filing an application in conflict with a pending application, must also in fairness be entitled to at least as much notice of a deadline for filing a non-conflicting application.

Nevertheless, the Commission's May 10 order (R. 1-5) purported to foreclose the filing of all but a limited number of standard broadcast station applications, such order to be effective immediately.[4] The Good Music application was not among the limited categories of applications which could be filed, thus the order of May 10, 1962 purported to foreclose for an indeterminate period of time the filing of the Good Music application.

Since the Good Music application was not in conflict with any pending application and therefore not required to be on file by any deadline established under Sec. 1.354(c) of the Commission's Rules, supra, a fortiori, the Commission was required, because of the language of Sec. 1.354(c) of its rules, supra, to give at least thirty days notice that the opportunity to file an application not in conflict with any pending applica-

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[4] At approximately 3:00 p.m. on May 10, 1962 a Public Notice was released by the Commission (Report No. 4188, Mimeo No. 20050) stating that effective that day applications in the standard broadcast service, unless they met certain limited conditions would not be accepted for filing. Applicants had until 5:00 o'clock to complete and file applications, but it is a physical impossibility to get an application from Florida to Washington in such a short period of time, even if the application had been complete. (See footnote 1, supra.)

tion would be "cut off." This is so, because the language of the rule was adopted pursuant to the decision of the Supreme Court in Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), to protect the right to file conflicting applications. The right to file a non-conflicting application and to have a hearing thereon before it is denied is implicit in Sections 309(a) and 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 309(a), 309(e), as interpreted in the Ashbacker case, and the Commission may not unreasonably deprive any potential applicant of this right guaranteed by the statute.

Nevertheless, the Commission deprived Good Music of this statutory right and returned its application as inconsistent with the Note to Sec. 1.354(c) of the Rules, adopted without effective notice on May 10, 1962 without consideration of the important public interest factors set forth therein and in Good Music's petition for reconsideration of the May 10, 1962 order and for other relief (R. 8-17) timely filed simultaneously with its application in accordance with the requirements of Sec. 405 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 405.

Ranger v. F.C.C., 111 U S. App. D.C 44, 294 F.2d 240 (1961), requires that the Commission's Rules, insofar as they affect the right to file conflicting applications, must be reasonable. It follows, then, that any rules affecting the filing of non-conflicting applications must also be reasonable since the problems of processing non-conflicting applications are fewer and less complex than those for processing conflicting applications. In the Ranger case, relief was denied to the appellant because it had failed to comply with provisions of the Communications Act, and the Commission's Rules of which it had at least thirty days prior notice.

Here there was no effective prior notice at all of the May 10, 1962 order (R. 1-5), and the Ranger case, which requires a reasonable treatment by the Commission with regard to foreclosing the right to file

conflicting applications, does not support the Commission's unreasonable May 10 order.

A sudden "freeze" on the filing of practically all standard broadcast applications with only two hours notice at the most to potential applicants spread all over the United States is clearly unreasonable because of the provisions in the Communications Act and the Commission's Rules concerning the requirements for and the preparation of applications, and the provisions of the Rules with regard to prior notice of deadlines for filing applications.

The Commission has not alleged that the application of Good Music was unacceptable for filing and claimed no basis for its return other than the May 10, 1962 order here appealed from (R. 1-5). Since this order cuts off statutory rights and disregards Good Music's reliance on these rights to its detriment in the expenditure of time and money in the preparation of its application to improve its facilities in the public interest, the Commission was unreasonable, arbitrary and capricious in adopting it without any effective prior notice, and denied due process to Good Music. In addition the Commission has arbitrarily and capriciously disregarded the public interest in the expansion and improvement of Good Music's broadcast service.

Because of the lack of notice and the consequent denial of due process, the order of May 10, 1962 (R. 1-5) must be reversed; likewise the order of October 10, 1962 (R. 18-37) affirming the prior erroneous order must also be reversed.

III. The Commission, Under all Circumstances Before it, Was Arbitrary and Capricious, Assuming, Arguendo, the Validity of the Amendment of Its Rules by Order of May 10, 1962, in Its Refusal to Waive The Provisions of Such Rule Change With Respect to Good Music's Application.

Among the relief requested by Good Music in its petition for reconsideration of the May 10, 1962 order (R. 1-5) assuming, arguendo, the validity of the order, was a waiver of the rules changes adopted therein amending Sec. 1.354(c), supra, in order to permit the acceptance of the Good Music application. (R. 8-17.) While it is recognized that a waiver is a matter of the Commission's sound discretion, it is apparent that the Commission has arbitrarily and capriciously abused that discretion.

Good Music had incurred expenses and expended time and effort in the preparation of its application, in the taking of electrical measurements to determine potential interference and in locating a new site for its transmitter. Its application was filed within thirty days after the Commission's May 10, 1962 action and it, together with the petition filed therewith (R. 8-17), demonstrated that the Good Music application would serve the public interest. In the first place, the proposed operation by Good Music would not cause or increase interference to any existing standard broadcast station or any station proposed in a pending application. On the contrary, because of the proposed relocation of the transmitter site, inland at a distance from the ocean where electrical conductivity is higher than over land, the proposed operation of Good Music's station at the higher power proposed would reduce the electrical interference now caused to existing station WELE, Daytona Beach, Florida (R. 15). In addition to reducing interference and not causing any additional interference to any existing or proposed station, grant of the Good Music application would enable Station WKTX to serve 471,647 people in the future rather than the 235,524 it now serves, representing an increase of over 100% (R. 15). Furthermore, people

now receiving service from WKTX would receive a higher quality signal (ibid). Thus it is seen that the proposed application will have no deleterious effects on any existing or proposed station, and in fact will reduce interference to an existing station and it will cause a significant improvement in the service of the station in question in the public interest. The Commission alleges in its Order of October 10, 1962 (R. 18-37) directing the return of the Good Music application, that it considered the waiver and denied it based on the fact that the policy considerations of the "freeze" were of the " . . . utmost importance" (R. 28-29).

The Commission has also justified its "freeze" on standard broadcast applications on the general proposition that continued allocation of " . . . new stations . . ." (R. 20) would intensify the technical problems which the Commission proposes to remedy by formal rule making to amend the standard broadcast technical standards which as yet, ten months after the "freeze," has not been commenced by notice of proposed rule making. It is clear that this justification by the Commission is totally inapplicable to the foregoing factual context of the Good Music application which does not seek a "new station" but only an increase in power of an existing station under the rather extraordinary circumstance that such increase will actually reduce interference to another existing station, and will not cause interference to any existing or proposed station. Since the Commission's own justification of its "freeze" has no applicability to the Good Music application, it was patently arbitrary and capricious for the Commission to deny the request for waiver without any discussion of the factual basis for such waiver set forth by Good Music (R. 28-29).

The foregoing factual recitation concerning the Good Music application demonstrates that grant of the application would have no adverse effect on existing stations or proposed applications and would result in a tremendous improvement in the service of an existing station. No adverse factors whatsoever have been cited by the Commis-

sion, nor do any exist, concerning the need in the public interest for a grant of the Good Music application; the only justification for the return of the application by the Commission is the illegal "freeze" order itself. Since, in addition, the freeze was instituted without notice, it is apparent that under the specific circumstances advanced with regard to the Good Music application that the waiver should have been granted, assuming the legality of the May 10, 1962 Report and Order (R. 1-5), and the Good Music application accepted for filing and considered in accordance with the Commission's Rules.

CONCLUSION

For all the foregoing reasons this case should be reversed and remanded to the Commission with directions to carry out the judgment of this Court pursuant to the provisions of Sec. 402(h) of the Communications Act of 1934, as amended, 47 U.S.C.§402(h), affording Good Music Broadcasting Company, appellant in Case No. 17,424 and petitioner in Case No. 17,478, all the relief that this Court may direct.

Respectfully submitted,

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March 20, 1963

APPENDIX

STATUTES AND RULES INVOLVED

The relevant parts of the Statutes and Rules to which references are made in this Appellant-Petitioner brief follow:

STATUTES

Communications Act of 1934, As Amended; 47 U.S.C. Sec. 151 et seq.

Sec. 308(a) provides in part as follows:

> "The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: . . ."

Sec. 308(b) provides as follows:

> "All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee."

Sec. 309(a) provides as follows:

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may

officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application."

Sec. 309(e) provides in part as follows:

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . ."

Administrative Procedure Act, 5 U.S.C. Sec. 1001 et seq.

Sec. 4 (5 U.S.C. Sec. 1003) provides as follows:

"Except to the extent that there is involved (1) any military, naval or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.-

(a) Notice.- General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures. - After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of §§ 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates. - The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions. - Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION (47 C.F.R. Sec. 1.1 et seq.)

Sec. 1.304 (47 CFR Sec. 1.304) provides in part as follows:

Sec. 1.304(a)

"Each application shall include all information called for by the particular form on which the application is required to be filed unless the information called for is inapplicable in which case this fact shall be indicated."

Sec. 1.354 (47 CFR Sec. 1.354) provides in part as follows:

Sec. 1.354(c)

"Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are

drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications."

The note to Sec. 1.354 adopted May 10, 1962 (27 Fed. Reg. 4626) provides as follows:

"NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorization will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in § 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

BRIEF FOR THE UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,478
GOOD MUSIC BROADCASTING COMPANY, Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, Respondents.

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No. 17,479
DUPAGE COUNTY BROADCASTING, INC., Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, Respondents.

No. 17,481
ROBERT A. JONES, ET AL., d/b/a McHENRY
COUNTY BROADCASTING CO., Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, Respondents.

No. 17,483
FREDERICK ECKARDT, d/b/a MANSFIELD
BROADCASTING CO., Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, Respondents.

ON PETITIONS FOR REVIEW OF A REPORT AND ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

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Assistant Attorney General
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QUESTION PRESENTED

This brief discusses a question of jurisdiction not presented in the statement of issues stipulated to by the parties. All petitioners are seeking judicial review of Commission orders denying their license applications on the basis of a previously-adopted rule. This review will be obtained in pending appeals to this Court under Section 402(b) of the Communications Act. The question presented is whether this Court has jurisdiction over petitions to review the same Commission rule-making action under Section 402(a).

INDEX

CITATIONS

INDEX (Continued)

The petitions for review in the above-captioned cases were filed pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), which provides for judicial review of all orders of the Federal Communications Commission except those orders appealable under Section 402(b). All petitioners are also seeking judicial review of the same Commission action under 402(b). The United States submits that the judicial review obtainable under 402(b) is the exclusive method of obtaining judicial review of the Commission action which aggrieves the applicants and that insofar as judicial review is sought under 402(a), petitioners are not aggrieved by the orders reviewable under 402(a) and therefore lack the necessary standing to obtain such review.

The United States is not a party to the appeals under 402(b) and if this motion to dismiss the petitions for review under 402(a) is granted for lack of jurisdiction, it cannot express any opinion on the merits of the controversy. If this motion to dismiss is denied, however, the United States joins in the brief of the Federal Communications Commission on the merits.

STATEMENT OF FACTS

The United States adopts the factual statement made in the brief of the Federal Communications Commission in the cases invoking this Court's jurisdiction under 402(b). For purposes of this brief, it need only be emphasized that the Commission's order of May 10, 1962, amending Section 1.354 of its rules, after establishing certain interim criteria, concludes as follows: "Applications for new stations or for major changes in existing

stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant" (Kessler, R. 5). The Commission's opinion and order of October 10, 1962, is divided into three parts; a denial of requests for reconsideration of the May 10 order on various grounds of alleged invalidity (Kessler, R. 27-36); a determination that certain requested modifications in the interim criteria would not be made (Kessler, R. 36); and a denial of waivers of the interim criteria requested by each applicant (Kessler, R. 36-44). The final Commission orders implementing the May 10 freeze order involved the return of each application for a construction permit to the applicant.

ARGUMENT

THE PETITIONS FOR REVIEW OF THE COMMISSION'S RULE-MAKING ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION UNDER SECTION 402(a) OF THE COMMUNICATIONS ACT

The procedure for obtaining judicial review of final orders of the Federal Communications Commission is set out in Section 402 of the Communications Act, 47 U.S.C. 402. Section 402 provides two avenues of judicial review, depending on the type of order entered by the Commission. Thus, 402(a) requires that "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5, 5 U.S.C. 1031-1042.[1/] Section 402(b) authorizes

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1/ Chapter 19A of Title 5, 5 U.S.C. 1031-1042, referred to in Section 402(a) of the Communications Act provides for judicial review at the behest of "[a]ny party aggrieved by a final order reviewable under this chapter . . ." 5 U.S.C. 1034.

appeals to this Court from various licensing orders of the Commission including, inter alia, by "any applicant for a construction permit or station license, whose application is denied by the Commission".

All petitioners under 402(a) in these cases challenging Commission rule making are also appellants under 402(b) contesting the denial of licenses by application of the rule. It is unclear why the petitioners are seeking review of agency action under both subsections of 402. We submit that, under well-recognized principles of this Court, petitioners' exclusive right to judicial review is under Section 402(b); moreover, there are serious questions regarding their standing to attack the Commission's orders under 402(a).

A. This Court has held that the provisions for judicial review in Sections 402(a) and 402(b) are mutually exclusive, as their very terms state. Functional Music Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F. 2d 543 (1959), Friedman v. Federal Communications Commission, 105 U.S. App. D.C. 47, 263 F. 2d 493 (1959). Therefore, orders reviewable under 402(a) may not be reviewed under 402(b) and vice versa. However, the mutual exclusivity of judicial review under 402(a) and 402(b) does not preclude the court, in a 402(b) proceeding reviewing a licensing order, from determining the validity of any Commission rule which served as the basis for the particular Commission order reviewed under 402(b). Ridge Radio Corp. v. Federal Communications Commission, 110 U.S. App. D.C. 277, 292 F. 2d 770 (1961).

Applying these principles to the present petitioners, it is clear that they seek judicial review of the Commission's rule of May 10, 1962, only as it serves as the basis for denying each particular license application. The denial of the license application is reviewable in this Court under 402(b), as petitioners recognize by their appeals, pursuant to that section, and the May 10, 1962, order of the Commission, which is the sole basis for the denial of their applications, will be reviewed in the course of that proceeding. This is not a case like Functional Music v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F. 2d 543 (1959), in which the applicability of Section 402(a) or 402(b) depended upon the ultimate characterization of the Commission order in question as licensing or rule-making. Here the Commission has taken two distinct actions--first, issuing a rule and adopting general criteria; second, applying the rule and criteria to applications filed by each of the appellants. The orders denying each petitioner's application for a construction permit are unequivocal and they have availed themselves of their right of appeal under 402(b).

While not presented in this case, since both the appeals under 402(b) and the petitions for review under 402(a) are before this Court, it is conceivable that sanctioning this double judicial review of the same Commission action could seriously impinge on the expressed Congressional policy of having this Court review all Commission action dealing with applications for licenses in the interest of uniformity. See S. Rep. 44, 82d Cong., 1st Sess., p. 11 (1951); H. Rep. 2122, 81st Cong., 2d Sess.,

p. 2 (1950). This Court has implemented this policy by liberally construing the categories of orders appealable to this Court alone under 402(b). Tomah-Mauston Broadcasting Co. v. Federal Communications Commission, ____ U.S. App. D.C. ___, 306 F. 2d 811 (1962). Review under 402(a) is not limited to this Court (see 5 U.S.C. 1033) and it would be possible for another court of appeals to be considering a rule-making action challenged by petition for review under 402(a), at the same time that this Court was reviewing under 402(b), Commission licensing action taken pursuant to that rule. Unless this Court were willing to restrict the review under 402(b) to the denial of the license itself and not go into the Commission's basis for its action, or the other court of appeals was willing to defer consideration of the matter under 402(a), a potential conflict between two courts of equal jurisdiction might occur.

B. The above discussion assumes that the petitioners have standing to seek judicial review under 402(a) of the Commission's orders of May 10, 1962, and October 10, 1962, insofar as they are reviewable under that section. However, as indicated above, all that can be reviewed under 402(a) is the procedural rule of May 10, 1962, imposing the freeze and the rule-making portions of the order of October 10, 1962, which denied reconsideration of the freeze and denied modification of the interim criteria. The denial of each applicant's license must be reviewed under 402(b). It is submitted that the Commission's rules, in themselves, had no impact on any of the petitioners until they had actually made application for a license which was denied on the basis of the rule. Nor was any sanction imposed for

failure to comply with the rule. This rule announced that after a certain date applications for AM radio licenses would not be accepted unless in conformity with the interim criteria. None of the petitioners were injured by that order within the meaning of 5 U.S.C. 1034 which provides that judicial review can be obtained only at the request of a "person aggrieved."

As the Court observed in California-Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 270, 239 F. 2d 426, 433 (1956), "In all cases held reviewable something was happening to the complainant. Either someone was doing something to him or he was placed under an obligation to do something." See also Cincinnati Gas & Electric Co. v. Federal Power Commission, 101 U.S. App. D.C. 1, 246 F. 2d 688 (1957). A rule to be applied in future licensings was held not to aggrieve a petitioner since adverse effects "depend[ed] upon future administrative action", in Aircoach Transport Ass'n v. Civil Aeronautics Board, 103 App. D.C. 107, 109, 255 F. 2d 185, 187.

The requirement of imminent injury for aggrievement clearly applies under the present Section 402(a). The 1950 Amendment to 402(a) transferred to the courts of appeals proceedings previously brought in three-judge district courts to enjoin Commission orders not covered by 402(b). H. Rep. 2122, 81st Cong., 2d Sess.; H. Rep. 1620, 80th Cong., 2d Sess. Applying general equitable principles to these proceedings in three-judge district courts, the Supreme Court, in Columbia Broadcasting System v. United States, 316 U.S. 407, recognized that an adverse effect arising "only on the contingency of future administrative action" would not be sufficient

(p. 423); it was necessary to show "the threat of irreparable injury" (p. 423) and that review of subsequent licensing action would be "no adequate remedy" (pp. 423-424).

The impact of the order promulgating the freeze on the petitioners in this case was contingent on two events; (1) the filing of an application for an AM licence; and (2) its nonconformity with the interim criteria. Until these two events occurred, the injury to petitioners is indistinguishable from that suffered by the general public. Until the agency action has ripened into a rejection of a license application, reviewable under 402(b), the impact on petitioners is quite speculative. This is not a case like United States v. Storer Broadcasting Co., 351 U.S. 192, where the impact of the multiple ownership rules there at issue was not within Storer's control but instead could occur at any time through purchases or sales of stock; nor is there a demonstrable economic impact on petitioners comparable to the interference with contractual obligations which was deemed sufficient to confer standing in Columbia Broadcasting System v. United States, 316 U.S. 407. Petitioners are not subject to any civil or criminal sanction because of this rule. See Frozen Food Express v. United States, 351 U.S. 40. There are certain rules which in and of themselves have a readily discernible impact on certain persons, such as the Commission's rules allocating UHF television channels among communities. See Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954). In this instance, however, petitioners are aggrieved by the Commission action in denying each application and their aggrievement is crystallized in that action of the Commission.

Moreover, the lack of impact on petitioners is buttressed by the fact that the freeze was adopted by the Commission as a "procedural" rule, without the notice and hearing required by the Administrative Procedure Act, 5 U.S.C. 1004. As a procedural rule, it could likewise be modified or waived at any time without notice or hearing and the impact of its operation on petitioners awaited its application to each of them. This was recognized by all the applicants for construction permits, who, in addition to seeking reconsideration of the freeze order, sought a waiver of its requirements with respect to their applications. The denial of such applications is the proper basis for the review proceedings in this Court.

CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed.

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MAY 1963